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M E M O R A N D U M

August 24, 2001

TO: DIVISION OF THE COMMISSION CLERK AND ADMINISTRATIVE SERVICES

FROM: DIVISION OF LEGAL SERVICES (HARRIS) LDH

RE: DOCKET NO. 010941-WS - APPLICATION FOR CERTIFICATES TO PROVIDE WATER AND WASTEWATER SERVICE IN OSCEOLA COUNTY BY KINGS POINT UTILITY, INC.

Please place the attached letter dated August 21, 2001, from Martin S. Friedman, Esquire to Norman J. Smith, Esquire, in the above-referenced docket file.

LDH/lw
Attachment
cc: Division of Regulatory Oversight (Walden, C.Johnson)

APP ____
CAF ____
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ROBERT M. C. ROSE
OF COUNSEL

August 21, 2001

Norman J. Smith, Esquire
Brinson, Smith & Smith
P.O. Box 421549
Kissimmee, FL 34742-1549

Re: Kings Point Utility, Inc.
Application for PSC Certificates
Our File No. 26039.06

Dear Norman:

As a follow up to our recent telephone conferences, I wanted to provide you with a historical analysis of how we all got in this predicament regarding the Kings Point water and wastewater utility system.

I have enclosed an undated memorandum from Utility Director, Brian Wheeler, to City Manager, Mark Durbin, regarding the City's anticipated receivership of the Kings Point utility systems. With regard to the Florida Public Service Commission's jurisdiction, the City was given erroneous advice from its attorneys regarding its ability to raise rates to meet operating expenses. Clearly the FPSC did not have jurisdiction when a utility in receivership is operated by a governmental entity and, in fact, the City subsequently received a declaration to that effect from the FPSC. Of particular note, is the last sentence of the memo regarding the City ultimately ended up with ownership of the King's Point system.

On April 1, 1991, Judge Stroker entered an Order appointing the City of Kissimmee as receiver for the Kings Point systems and a copy of that Order is enclosed. The deficiencies in the systems which led to the Court ruling the systems be put into receivership all existed prior to Kings Point Utilities, Inc.'s purchase of the systems. You will note that this Order, which was prepared by DEP with the concurrence of the City, originally would have eliminated any further interest of Kings Point Utility, Inc. in those assets. As you can see, we were successful in having the Judge recognize that Kings Point Utility, Inc. owned the assets in question and would likely be entitled to return of those assets at some point in the future.

Shortly after the City took over as receiver, they had their outside counsel, the Katz Kutter law firm in Tallahassee, outline the legal issues in connection with their receivership of the Kings Point utility system. As it relates to the current predicament, I would direct your attention to the discussion of the land lease beginning on Page 7. Even though the City was admonished to give the issue of the lease high priority, the City ignored the lease. The landlord sued for back rent (Ron Hand handled this litigation) and after a successful appeal by the landlord, Judge Coleman entered a Final Judgment on December 18, 1998 in the amount of $267,632. That Order was affirmed by the Appellate Court. This Judgment includes some double rent and pre judgment interest, which would not have been payable but for the City's refusal to pay the rent on a monthly basis as it accrued. Further, this Judgment only included rent through August 1, 1996. The City began paying the monthly rent on January 1, 1999.

In order to collect the past due rent, the landlord requested the Court require the receiver to increase rates in order to repay this Judgment over a 60 month period. A copy of that Order is enclosed. You will note that the Order also required the City to increase its rates to cover this additional payment, up to the amount the City believed that it was legally authorized to charge. The City erroneously believed that its rates were limited by Chapter 180, F.S. in spite of the clear and unambiguous language of the statute to the contrary. The City appealed this Order.

The Fifth District Court of Appeal in March of 2000 affirmed the Order requiring the City to increase rates to pay this additional rent amount, specifically finding that Chapter 180 did not apply. As you know, that limitation applies only to "municipality owned water and sewer utilities." You will also note that the Court specifically noted that the City had breached its duty as receiver for not paying the rent expense. Notwithstanding this opinion, the City has continuously failed to increase the rates, while at the same time complaining to the Court that the City, as receiver, was losing money on the utility operations. Even though the City did not increase the rates, it began paying the additional money to the landlord beginning in May of 2000.

The trial Court on January 31, 2001 entered a Final Judgment to the landlord for the rent from August 1, 1996 through December 31, 1999 in the total amount of $197,254, which also included double rent and substantial prejudgment interest. One of the Motions presently pending before Judge Adams is the request to increase rates in order to amortize this Judgment. Frankly, the landlord does not care whether the rates are increased, if the City, as it did with regard to the prior Judgment, went ahead and paid the amortized amount. As you know, Judge Adams is seeking customer input on this Motion. The Court subsequently entered a Final Judgment for attorneys fees

and costs in the amount of $52,801.85 and I have included a copy of that Final Judgment.

Had the City complied with its obligations to begin paying rent at the outset of the receivership, it would not have incurred hundreds of thousands of dollars in double rent, over $50,000 in attorneys fees to the landlord (this does not include the City's own attorneys fees) and over $100,000 in prejudgment interest.

As you know, Kings Point Utility, Inc. has filed an application with the Public Service Commission for authority to operate the Kings Point Utility system. While a number of customers of that system have written letters in opposition to that certification, the City of Kissimmee has made it clear that the City is not going to take over providing retail service to the Kings Point customers. Enclosed is a copy of a portion of the transcript of a recent hearing where Mr. Smallwood made that assertion. The City has offered Kings Point Utility, Inc. a bulk rate which would be passed along to the Kings Point customers along with its own expenses of operating and maintaining the utility system. If the City had merely begun paying the rent at the outset of the receivership, it could have done so with a minimal rate increase to the customers. However, we are now in a predicament where it is necessary for there to be a substantial increase in rates to the customers as a result of the mismanagement and exercise of bad judgment by the City in this receivership.

We certainly understand the customers' concerns regarding substantial increases in their rates, however, the City of Kissimmee is clearly the party responsible and should be held accountable. I understand that Judge Adams will be looking for input from representatives of the customers and we are willing to work with you toward a reasonable solution.

Very truly yours,

MARTIN S. FRIEDMAN
For the Firm

Dictated by Mr. Friedman but signed in his absence to avoid delay in mailing.

MSF/tms
Enclosures
cc: Mr. Walter L. Medlin (without enclosures)
James Spoonhour, Esquire (without enclosures)
Ronald Hand, Esquire (without enclosures)

MEMO

TO: Mark F. Durbin

FROM: Brian L. Wheeler BLW

RE: King's Point Utilities, Receivership

The City of Kissimmee may be appointed receiver of the King's Point Utilities during the first week of April 1991 or soon thereafter. In this memo I will attempt to outline the responsibilities and liabilities of the city as receiver of the utility.

As receiver, the city will stand in as the owner or take the place of the owner of the utility system. In this capacity the city will have the responsibility to operate and maintain the system in accordance with the court's order and all applicable laws and regulations.

The laws, regulation and agencies governing the King's Point Utilities operation is the same for the city's utilities with the exception of its Florida Public Service Commission (FPSC). Because the utility is privately owned and the city as receiver is not assuming ownership, the utility is governed by FPSC. The primary limitation to FPSC jurisdiction is their control of rates and charges. Any modification to the King's Point Utilities' rates will require the FPSC approval. Mr. John Marks of Katz, Kuter, Haigler, Alderman, Davis, Marks & Rutledge, Sylvia Alderman's firm which covers FDER and PSC matters for the city, has advised that the city may apply for an indexing of the King's Point rates which would allow the rates to be adjusted for inflation since their adoption in the early 1980's. This procedure would be explored immediately upon appointment as receiver.

One advantage of having rates controlled by the FPSC under receivership is there is no restriction on the level the rates may be adjusted relative to the city's rates. Rates will be set based upon the cost of providing service and providing the improvements necessary to meet state and federal regulations.

In the role of a receiver the city shall not be obligated to pay out expenses which are not covered from funds generated by rates of system. The city shall be reimbursed for all costs of the system, and if not immediately covered by the funds of the system such costs shall become a lien on the assets of the system. The city is not obligated nor can the city be required to expend funds from its other utility systems for the benefit of King's Point.

In addition to the routine operation and maintenance of the system, the city will be obligated to attempt to meet the terms of the final judgment against the utility from the action by FDER. The city will have to develop a plan within approximately 90 days for correcting the deficiencies with the water and sewer system. The plan would deal with the immediate and long term solution to the utility's problems, and the cost and financing of the corrections. One aspect of the court order which could impose some significant operational costs on the utility in the immediate future is a requirement to prevent overflow of wastewater from the percolation ponds. If the ponds are incapable of handling the quantity of effluent generated by the treatment facility, the excess will require hauling to another disposal site. Again, these costs must be covered by the rates of the utility.

The city will not be obligated to pay the fines and other fees resulting from the various legal proceedings against King's Point. If the court or agencies were to attempt to collect the fines or fees, the costs would be applied to the funds of the utility.

The utility must be operated as a separate entity and all costs associated with its operation tracked to ensure that all costs associated with its operation are charged against the fees collected. Careful documenting of costs will establish the basis for rate adjustments and the basis for decision making on long term improvements and city ownership.

If at any time the city finds the requirements of being a receiver unacceptable, then the city may notify the court of its desire to relinquish its role. At some point the ownership of the utility will have to be settled and the city may become owner if that is its desire.

RECEIVED
APR 4 1991

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR OSCEOLA COUNTY, FLORIDA

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION,

Plaintiff,

Case No. CI89-1764

vs.

KINGS POINT UTILITY, INC., WALTER LEE MEDLIN, and WILLIAM R. WRIGHT, as Trustee,

Defendants.

_____/

ORDER

THIS CAUSE came to be heard in Osceola County on April 1, 1991 upon Plaintiff, State of Florida Department of Environmental Regulation's ("DER"), Amended Motion for Contempt. Both parties being represented by counsel and the Court being fully advised in the premises, the Court hereby FINDS:

1. Defendant, Kings Point Utility, Inc., currently operates the water and sewer systems serving the Kings Point subdivision, Kings Highway, Kissimmee, Osceola County, Florida.

2. This Court entered a Final Judgment on January 11, 1991 requiring Defendant, Kings Point Utility, Inc., inter alia, to perform the following corrective actions to the Kings Point water and sewer systems within the specified time periods:

(a) Within 45 days of entry of this Final Judgment, Defendant, Kings Point Utility, Inc., shall install and place into service a minimum two drinking water supply wells at the Kings Point water system, in accordance with Florida Administrative Code ("FAC") Rule 17-555.315(1). [¶II(a) of Fin Judgment].

(b) Within 45 days of entry of this Final Judgment, Defendant, Kings Point Utility, Inc., shall install and place into service a source of adequate auxiliary power equipped with an automatic start-up device to the Kings Point water system, in accordance with FAC Rule 17-555.320(6). [¶II(b) of Final Judgment].

(c) Within 45 days of entry of this Final Judgment, Defendant, Kings Point Utility, Inc., shall maintain the pressure tank at the Kings Point water system in good operating condition, in accordance with FAC Rule 17-555.350(1), through removal of the rust. [¶II(c) of Final Judgment].

(d) Within 45 days of entry of this Final Judgment, Defendant, Kings Point Utility, Inc., shall establish a routine cross-connection control program for the Kings Point water system, in accordance with FAC Rule 17-555.360(2). [¶II(d) of Final Judgment].

(e) Within 45 days of entry of this Final Judgment, Defendant, Kings Point Utility, Inc., shall complete construction

and place into service the looping of the Kings Point water distribution lines, as approved by DER, as well as complete satisfactory bacteriological and pressure testing in accordance with DER rules, provide an engineer's certification of completion, and receive a DER letter of clearance with respect to these modifications in accordance with FAC Rule 17-555.345. [II(e) of Final Judgment].

(f) Within 60 days of entry of this Final Judgment, Defendant, Kings Point Utility, Inc., shall submit a complete construction permit application to DER for bringing the Kings Point sewer system into compliance with FAC Chapters 17-4 and 17-600. The modifications encompassed within the application shall include but not be limited to all modifications necessary to ensure: (i) the effective treatment of effluent entering the treatment plant in accordance with the treatment standards in FAC Chapter 17-600, including but not limited to standards for BOD and TSS effluent pursuant to FAC Rule 17-600.420(1); and (ii) no more unpermitted overflows from the system's percolation ponds or other unpermitted disposals or discharges of wastewater. [II(f) of Final Judgment].

(g) As an interim measure prior to implementation of the permitted modifications to the Kings Point sewer system, and within 35 days of entry of this Final Judgment, Defendant, Kings Point Utility, Inc. shall (i) keep the percolation ponds clear of

vegetation; (ii) install a staff gauge at each percolation pond, record the daily pond levels, and provide the levels with the monthly operating reports to DER; and (iii) with a licensed hauler, transport and dispose in accordance with state regulations any wastewater in the percolation ponds which is at a higher level than one foot below the lowest discharge point of each pond, and notify DER within 24 hours of all such episodes of wastewater at or above this level and each such transportation and disposal of wastewater, including the name of the hauler, the quantity hauled, and the method and place of disposal. [¶II(i) of Final Judgment].

3. Defendant, Kings Point Utility, Inc. has failed to complete the above-stated requirements of this Court's Final Judgment within the specified time periods.

4. DER inspection of the Kings Point water and sewer system and DER records visually confirms lack of compliance with subparagraphs 2(a)-(c), (f), and (g) above.

5. With respect to subparagraph 2(d) above, although Defendant's current president, director and owner, Walter Lee Medlin, claims that he implemented a routine cross connection control program substantially prior to the entry of the Final Judgment, he has no written record establishing any such program. The president of the Kings Point residents' committee, Fred Smolensky, testified that he never received anything in writing

concerning a routine cross connection control program for Kings Point from Defendant or any other person or entity. The person who provides on-site operational services for the Kings Point water system, Lynn Todd, has also never seen any routine cross connection control program for the system. Based on the weight of the evidence presented, no routine cross connection control program has been established for the Kings Point subdivision.

6. With respect to subparagraph 2(e) above, although Defendant has indicated looping has been installed, Defendant has failed to submit engineer's certification indicating completion of the approved looping and to receive a DER letter of clearance with respect to these modifications in accordance with FAC Rule 17-555.345.

7. Defendant does not have the present financial ability to complete the required corrective actions under the Final Judgment. Although Defendant's president, director and owner, Walter Lee Medlin, suggests that he personally intends to arrange for the corrective actions to be completed when he can afford it, he is not willing to be personally liable for these corrective actions.

8. This is the fourth time DER has moved for contempt based on Defendant's failure to complete corrective actions required by this Court. The three previous motions came prior to the Final

Judgment and resulted in two stipulated orders of contempt and additional relief in the Final Judgment based on violation of the stipulated orders. Based on the evidence presented, Defendant cannot be relied on to complete the required corrective actions under the Final Judgment in a timely and effective manner.

9. In September 1989, Defendant gave notice of abandonment of the Kings Point sewer system. Defendant never followed through with the abandonment proceedings and currently remains in control of the Kings Point water and sewer systems.

10. Previously, after Defendant gave its notice of abandonment, the City of Kissimmee petitioned to be appointed receiver for the Kings Point sewer system. The City of Kissimmee is presently willing to be the receiver for the Kings Point water and sewer systems in accordance with the requirements of this Order.

11. It is in the best interests of the public health, safety, and welfare and the environment that a receiver be appointed to ensure compliance with the Final Judgment and/or to arrange for provision of water and sewer service to the residents of the Kings Point subdivision through another viable utility(ies).

Based on the foregoing, it is hereby ORDERED AND ADJUDGED:

A. The City of Kissimmee is hereby appointed receiver of the Kings Point water and sewer systems. This receivership shall

continue from the date of entry of this order until such time as this Court and any appropriate regulatory agencies shall approve of the permanent transfer of ownership of the utility systems to a ~~new~~ potential owner or back to the Defendant, Kings Point Utilities

B. As receiver, the City of Kissimmee shall:

(i) operate, manage and control the Kings Point water and sewer systems;

(ii) maintain and control the books and records relating to the Kings Point water and sewer systems;

(iii) charge, collect and receive the payments and other moneys arising from the operation of the Kings Point water and sewer systems and expend these moneys as necessary for the operation, management, and control of the systems;

(iv) keep accurate records of the amounts collected and expended with respect to the operation, management, and control of the Kings Point water and sewer systems;

(v) be authorized to apply to the Florida Public Service Commission for such rate adjustments as are appropriate for the effective operation, management, and control of the Kings Point water and sewer systems;

(vi) be reimbursed for all costs and expenses incurred in the operation, management, and control of the Kings Point water and sewer systems; to the extent costs and expenses are not covered by the amounts charged, collected, and received from

the operation of the systems, any such deficiency shall constitute a lien on the systems' assets upon approval by the Court;

(vii) within 90 days from the date of entry of this Order, file with the Court and serve upon DER a proposed schedule for bringing the systems into compliance with this Court's Final Judgment entered January 11, 1991 and/or providing service to the residents of the Kings Point subdivision through tying the residents into another/other utility facility(ies);

(viii) in the interim prior to Court approval of a proposed schedule pursuant to the foregoing subparagraph, operate the utility systems in accordance with paragraph II (i) of the Final Judgment and, in all other respects, as much as possible without additional construction, in accordance with Chapter 403, Florida Statutes, and DER rules and regulations.

C. Defendant, Kings Point Utility, Inc., shall:

(i) turn over to the City of Kissimmee within five days of entry of this Order all books, records, and keys pertaining to the Kings Point water and sewer systems;

(ii) not obstruct or interfere with the City of Kissimmee in the exercise of the powers and duties which it is receiving pursuant to this Order.

~~(iii) within five days of entry of this Order, give notice of abandonment of the Kings Point water and sewer systems~~

~~to the Florida Public Service Commission~~.

D. The City of Kissimmee, being a municipality appointed as a receiver on the motion of the state, shall not be required to post a bond pertaining to this receivership.

E. Nothing in this Order or the receivership designated hereunder shall prohibit any property which is the subject of this receivership from being reached by execution or similar process, provided that, in order to ensure continuous and effective utility service, no disposition of property which is the subject of this receivership shall be final and effective until approved by the Court and any appropriate regulatory agencies.

F. The Court reserves jurisdiction to enforce the terms of the Final Judgment and this Order and to enter such further orders as are necessary to bring the Kings Point water and sewer systems into compliance with Chapter 403, Florida Statutes, and DER rules and regulations.

DONE AND ORDERED in Osceola County, Florida, this 1st day of April, 1991.

Circuit Judge

conformed copies furnished to:
Steven A. Medina, Esq.
Martin Friedman, Esq.
R. Stephen Miles, Esq.
Walter Lee Medlin
William R. Wright
Donald Smallwood, Esq.
John Marks, Esq.
Neal D. Bowen, Esq.
Noreen S. Davis, Esq.

MEMORANDUM

TO: John R. Marks

FROM: Gary P. Timin

DATE: May 28, 1991

RE: Receivership of Kings Point Utility, Inc.
Outline of Legal Issues

This memo sets forth a preliminary outline of legal issues that I believe should be addressed by the City of Kissimmee (the "City") in its capacity as receiver (the "Receiver") for Kings Point Utility, Inc. (the "Utility"). The outline is not intended to be exhaustive but rather to assist in further analysis and planning. It is based principally on a review of the file, our discussions of these points, and my familiarity with receivership procedures in other contexts. More extensive legal research will almost certainly be required on various issues.

The April 1, 1991, Circuit Court order appointing the City as Receiver (the "Order") was issued on the motion of the Florida Department of Environmental Regulation ("DER"). The Order establishes the Receiver's initial duties but should not be viewed as comprehensive. Although the City had moved at an earlier stage for its appointment as receiver after the Utility or its owner filed a notice of abandonment with the Public Service Commission ("PSC"), that notice evidently was later withdrawn, and the Order was not issued on the county's motion, so that the statute on abandonment, Fla. Stat. §367.165 (1989), is not strictly applicable. In any case, we are aware of no other statutes or regulations that specify or expand upon the Receiver's rights and responsibilities. Rather, the appointment of a receiver is one of the court's inherent equitable powers, and the Receiver remains subject to the ongoing supervision and direction of the appointing court.

Although an equitable receiver's powers and duties must be conferred by the appointing court, a receiver for an operating business is generally appointed either (a) to conserve and manage the business pending its further disposition, or (b) to liquidate the business for the benefit of its creditors and other claimants. The provisions of ¶B of the Order clearly indicate that the Receiver here has been appointed for purposes of conservation and management. Also, the Order expressly contemplates (¶A) that "ownership of the utility systems" will ultimately be returned to the Utility or a new owner, but only after further approval of the court and "any appropriate regulatory agencies," an apparent reference to PSC and possibly

DER. (The Order's language is imprecise and instead should speak of returning control of the Utility to former management or transferring its assets to a new owner. Ownership of the Utility remains with its stockholder(s). The Utility owns or leases its properties, including the "utility systems.") Thus, I believe that it is most accurate and fruitful to view the Receiver as a conservator charged with managing and operating the Utility pending judicial and regulatory approval of a permanent disposition, bringing the facility into closer compliance with DER regulations and prior court orders on environmental matters, and developing a recommendation for submission to the court regarding the best means of furnishing water and sewer services to the Utility's customers over the longer term.

The following outline assumes that the City's appointment was intended to be as Receiver for the Utility as a corporate entity, so that the receivership estate consists of all assets of the corporation. However, some phrasing in the Order could be read as negating this assumption. It states in ¶A (first sentence) that the City is to be "receiver of the Kings Point water and sewer systems," and ¶B repeatedly refers to these systems. This may have been no more than a convenient choice of language, but, if not, the legal ramifications would be important. For example, if the Utility owns or leases any properties beside the systems, the Receiver may have no power over such other properties. Similarly, a receiver for a corporation takes the place of its management and has sole authority to act on behalf of, and to retain counsel and other consultants to represent and advise, the company. By contrast, if the Receiver has charge only of certain specified properties of the Utility, the company's board of directors and officers will retain authority over other corporate affairs, and their attorneys may speak for the corporate entity. This uncertainty may justify the Receiver's seeking further clarification from the court. At present, because it seems likely that the Utility has few assets, if any, other than those comprising the "water and sewer systems," it may be safe to assume for practical purposes that these questions will not arise. Issues to which they would make a practical difference are noted in the course of the following outline.

As a final introductory point, one should always bear in mind that a receiver acts solely in a representative capacity and is a fiduciary charged with protecting and preserving the receivership estate for the benefit of others. A receiver may not exercise its powers regarding the property in receivership for its personal advantage. This rule becomes especially important where the person or organization acting as receiver may have some interest in utilizing, acquiring, or disposing of the property. That the City may later offer to operate or acquire all or part of the Utility's systems does not disqualify it from acting as Receiver, but this fact also does not enhance the Receiver's powers or relax its standard of care. To the contrary, it is

likely to subject the Receiver's conduct to even greater scrutiny than otherwise, given what might be perceived as the potential for conflicts of interest. Perhaps most importantly, if the Receiver proposes to transfer any of the Utility's assets to the City, the terms of the transaction must be arm's length and, of course, approved by the court. These relationships and duties will become even more complex if the City is also appointed as receiver for the equity interest in the real property that the Utility leases, as DER has requested.

I. ASSUMING CONTROL AND MARSHALING ASSETS

A receiver's initial steps usually aim to gain full control over the company's properties and operations and to marshal its assets. Typical examples follow. The Receiver has presumably already accomplished much of this.

A. Displacing Prior Management

A receiver for a corporation takes the place of the company's board of directors and executive officers. Even if the Receiver has authority over the water and sewer systems only, such persons should be removed from any power or influence over these operations of the Utility. Any former employees who are retained should be subject to clear lines of authority reporting to the Receiver and its designees.

B. Taking Possession of Physical Facilities

The Receiver should assert dominion and control over all facilities of the Utility. This includes control over access, such as changing locks and combinations, and arrangements for security of the premises. The same applies to equipment, machinery, and vehicles, as well as access to any computerized data and systems. Cash, checks, and other valuables should be inventoried and safeguarded. These are normal precautions against loss, injury, or unauthorized access.

C. Bank Accounts and Other Intangibles

The Utility presumably has some funds in banks and may have other investments held by depositories or brokers. The Receiver should notify all parties holding accounts or other investments of its appointment, and new signature cards or the like should be executed promptly. In short, all funds and other assets should be readily available to the Receiver and no one else.

D. Notices to Principals and Advisors

It is prudent for the Receiver to give formal notice of its appointment to former principals of the Utility (directors and officers) and its professional advisors (attorneys, accountants, and here perhaps engineers as well). Notices to principals should demand immediate delivery of all property or assets of the Utility that are in or come into possession of any such persons. Notices to advisors should demand delivery of or access to all files relating to the Utility and make clear that these persons have no further authority to represent or perform work for the Utility except as may be requested by the Receiver.

E. Inventory of Assets

Another initial step commonly undertaken is preparation of a comprehensive inventory of all assets and property of the receivership estate. This ties in to preparation of a financial statement, discussed below.

F. Employee Relations

The Receiver needs to retain and compensate employees, and employees of the Utility will want reliable information about the security of their jobs. To the extent that the Receiver uses City employees, these are recoverable expenses. Employee benefits, insurance, severance, and vacations are common issues of concern.

II. ROUTINE OPERATIONS AND MANAGEMENT

The Receiver must conduct and supervise the business operations of the Utility, including most urgently providing safe and reliable services to its customers. This is likely to consume the bulk of the Receiver's attention and the Utility's resources. With the notable exception of environmental compliance, these activities should involve the least amount of legal work.

A. Furnishing Utility Services

Water and sewer services must be furnished to the Utility's residential customers. Assuming the system is basically operational, this presumably mainly involves operating and monitoring equipment and facilities that are in place. Even so, safety issues may be a concern, and repair and maintenance could require substantial expenditures. Other issues would

arise if a significant number of customers were seeking to be added to or removed from the system, or if water supplies were to become restricted or contaminated.

B. Billing and Collections

The Receiver should follow systematic billing and collection procedures, particularly in light of what appears to be the limited cash flow of the Utility and the demands on its revenues. Plainly, a basic duty of any receiver is to obtain payment of all money owed or coming to be owed to the estate.

C. Payment of Expenses

Incurring and paying expenses give rise to more complex issues. Expenses must be divided between (a) those incurred and unpaid before the date on which the Receiver's appointment became effective and (b) those incurred or authorized thereafter by the Receiver on behalf of the Utility. Although the receivership does not, at least at this stage, involve a composition or compromise of the Utility's debts, I believe that the Receiver has a legitimate basis to defer paying pre-appointment expenses that, in its reasoned judgment, do not confer a continuing benefit or value on the estate. (Payments due under the Utility's lease are discussed separately below.) For other reasons, the City needs to document carefully all expenses that it is incurring or advancing on behalf of the Utility, as these are so-called administrative expenses entitled to priority. All this is likely to require submissions to and approval by the court. All creditors should be reminded repeatedly that the Receiver will pay debts of the Utility only from the Utility's assets and that the City as a municipality has no liability for such debts. For example, I believe that there is correspondence from the holders of one of the mortgages on the property seeking payment of the mortage debt from the City. All such inquiries and demands should be emphatically and unambiguously rejected.

D. Record Keeping

The foregoing subsections imply that the Receiver needs to maintain accurate and detailed records. This includes not only accounting and financial records but also records of the Receiver's decisions and activities respecting the operation of the Utility systems. The potential for continuing litigation respecting the Receiver's conduct should not be forgotten. Documenting efforts to comply with environmental

regulations and orders and improvements in performance is an immediate priority.

E. Funding Cash Shortfalls

The Utility's apparently limited revenues and its need to expend potentially substantial sums on operations, maintenance, and environmental compliance suggest that it may encounter a cash shortfall. The City may be willing to advance funds to the Receiver in reliance on the priority that should be accorded to such debts and in expectation of recovering advances upon ultimate disposition of the Utility's property (see Order ¶B (vi)). Nevertheless, it must be remembered that such advances are presently unsecured, and the City is not assured of full recovery, much less interest on its advances, especially taking into account the cost of personnel time. One possible solution is for the City to take a security interest in the Utility's properties to secure its advances. If this is desired, the court should be asked to approve the Receiver's borrowing and pledge of the Utility's assets and the terms of repayment.

III. NON-OPERATIONAL ISSUES

This section collects a miscellany of important legal issues that are not so closely related to day-to-day operation of the Utility. Several other issues that look to the long-term or final disposition of the Utility are treated in a following section.

A. Challenge to Receiver's Appointment

We are advised that the Utility or its owner has challenged the Receiver's appointment by appealing the Order. In the absence of further information, expanding on this point is guesswork, but thought should be given to the issues that will be heard on appeal. As appointment of a receiver is committed to the discretion of the trial court, a reviewing court should give some deference to the lower court's judgment, but questions of law are of course subject to de novo review. We should also ascertain what evidentiary record is available to support the factual findings set forth in the Order.

B. Capital Improvements

One would hope that the Receiver will not be faced with deciding whether capital improvements should be made to the Utility's facilities, if only to assured continued

adequate services pending a permanent solution. The poor environmental record of the Utility under private management suggests that some expenditures may be necessary to bring the systems into compliance, particularly as to waste treatment and disposal. Financing might then be a formidable difficulty. I would recommend that the Receiver seek prior court approval of any significant capital expenditure.

C. Environmental Compliance

The order is fairly detailed regarding the Receiver's duties to try to improve the Utility's compliance with DER regulations and prior court orders. Even so, there is some ambiguity about the schedule that the court expects the Receiver to achieve. It seems reasonable to expect that the court will grant the Receiver some leeway in view of the serious deficiencies it inherited and the improvements it is making, especially if DER reports that it is basically satisfied with progress being made if not all results so far achieved. Prior management will probably continue to press this issue through such devices as its present "motion to compel." Recall also that the Order directs the Receiver to file a proposed compliance schedule with the court by on or about June 30, 1991 (Order ¶B(vii)).

D. Lease

The Utility leases the land that it occupies under a forty year lease from a trustee for the owner, with rent of at least $1,800 per month. Although some question has been raised whether the lease might be subject to attack, taken on its face the instrument is probably valid and enforceable. If the Utility has any defenses to payment of rent or other rights or remedies of the lessor, the Receiver should certainly investigate and assert them. However, the mere fact that the lessor or beneficiary is an affiliate will not suffice, and the Utility's continued possession and use of the property gives the lessor an easy argument that it is entitled to the agreed-upon rent or at least fair value. Further, an initial reading of the lease indicates that its terms may create other difficulties for the Receiver, such as the lessor's right to enter and reclaim the property. Because the Utility has at least potential claims against the lessor or his beneficiary, and because of a natural reluctance to put money into the hands of prior management, the court might be willing to consider approving payment of rent into escrow or into the court's registry or even temporary suspension or abatement of rents due. I

would accord this matter a high priority, especially in light of the demand letter from the beneficiary's counsel, which should be answered promptly. If the City is appointed as receiver for the beneficiary's interest in the land, this issue becomes even more complex and pressing and the court's guidance all the more important.

E. Mortgages

The land is subject to at least two mortgages. There has been some mention that the Receiver could somehow become liable for payments on the notes that these mortgages secure. This seems plainly mistaken. In fact, if there is any evidence that the Utility has previously made mortgage payments on land that it merely leases, the Receiver should consider whether it can recover such payments either from the party now liable on the notes (evidently the beneficial owner of the land) or from the mortgagees. At least one set of mortgagees has threatened to foreclose. While this warrants careful consideration, it is not immediately clear that foreclosure would be adverse to the Receiver's interests or rights or that the Receiver would have standing to object. Similarly, it is far from obvious that either the City or the Receiver should bid at any sale of the underlying realty that is conducted pursuant either to a foreclosure judgment or DER's creditor's bill.

F. Financial Condition

Although not directed to do so in the Order, I believe that the Receiver should take steps to ascertain the Utility's financial condition and to prepare financial statements as of a date as close as practicable to its appointment. Perhaps accountants or auditors on the City's staff could assist in this project, which I understand is already underway. Information about the Utility's finances are essential to the PSC rate filing, to creditors of the Utility, and to the Receiver's recommendation of a long-term plan for servicing the Utility's customers.

G. PSC Actions

We are assisting the Utility in preparing a filing for an increase in rates based on cost indices, and we have reason to expect expeditious processing of the filing once made. This should lead to an increase in revenues when implemented. Separately, the PSC has noticed its intention to cancel or revoke the certificates that had

been issued to the Utility's owner. The time for filing an objection to this action has not yet expired. If an objection is filed, the City should formally intervene in the proceeding. Although unlikely, an objection might require an evidentiary hearing before the PSC, from which an appeal might be taken. While cancellation of the certificates might prevent the owner from regaining operational control of the Utility systems, it will not extinguish his equity interest or impair the lease.

H. Litigation

The Receiver should ascertain whether the Utility is a party to any litigation other than the proceedings that led to appointment of the Receiver and DER's pending creditor's bill. If so, and assuming that the Receiver represents the corporation, the Receiver should seek to be substituted for the Utility as a party and assume the conduct of such litigation on behalf of the Utility. Similarly, if the Receiver becomes aware of a basis for asserting claims against anyone else in the name of the Utility, it should evaluate the claim and likelihood of recovery or other relief, just as does any other potential litigant.

I. Claims Against Insiders and Insurers

A receiver for a corporation often considers whether it has a basis for seeking to recover losses incurred by the corporation from insiders or insurers or both. Particularly in the context of failed financial institutions, receivers have frequently sued former directors and officers for negligent or reckless mismanagement, fraud, waste, or intentional conduct amounting to misappropriation of corporate property or opportunities. While we have far too few facts at hand to know whether any such claims could be sustained here, the record of repeated failure to comply with DER rules, court orders, and settlement agreements suggests that the possibility of such claims deserves serious study. At a minimum, any such claims might be a basis for proposing to pay rent due under the lease to a neutral stakeholder, but the potential for affirmative recoveries should not be overlooked. Similarly, it is possible that insurers of the Utility or its management could be liable for losses incurred either through insider misconduct, environmental liability, or property damage. All insurance policies and bonds of the Utility should be reviewed with this in mind to make sure that no claim is lost merely through failure to give proper notice. Failure to pursue potential

claims of this or any other sort could subject the Receiver to criticism by creditors of the Utility whose claims may otherwise go unsatisfied.

IV. LONG-TERM ISSUES

This final section covers three subjects that look toward the eventual termination of the receivership. Although that is unlikely to occur in the near future, some steps should be taken now in anticipation of it. How long the receivership should continue will depend mainly on (a) when a plan for retaining or disposing of the Utility's assets can be implemented, (b) whether the Receiver is responsible for all corporate affairs and assets or only those of the water and sewer systems, and (c) whether the owner or other creditors or claimants persist in litigating issues.

A. The Creditor Claims Process

As noted, the receivership is not now a liquidation, nor does it encompass a comprehensive settlement or discharge of the Utility's debts. Moreover, the Order expressly acknowledges that the receiver's appointment does not stay "execution or similar process" against any of the property in receivership, although any "disposition" of such property is subject to judicial and possibly regulatory approval (¶E). Nevertheless, I believe that it is appropriate and important for the Receiver to make efforts to identify and quantify all claims against the Utility that are held or asserted by creditors, stockholders, or others. To this end, we have recommended that the Receiver mail and publish a notice soliciting submission of documented claims. Part of this process is determining which claims, in what amounts, may be secured or otherwise entitled to priority. Information on claims is essential to preparation of financial statements and the other issues addressed in the following subsections. Also, it is only fair to alert creditors and claimants of the Utility's potential insolvency.

B. Recommendation for Ultimate Disposition

The Order expressly contemplates (¶A) that the court and any appropriate regulatory agencies will ultimately have to approve a "permanent transfer of ownership of the utility system," either by returning control to its present equity owner or by transfer to a new owner. Further, the Order directs the Receiver to file a schedule or plan within 90 days "for bringing the

systems into compliance" with the January 11, 1991 final judgment requiring remedial environmental measures "and/or providing service. . .through tying the residents into another/other utility facility(ies)" (¶B(vii)). The Receiver's proposal probably need not be limited even to these alternatives. What the court seems to desire is a recommendation for a permanent or long-term solution that promises to deliver adequate water and sewer services to the Utility's customers for the foreseeable future. We have been told that the Receiver is already working on such a proposal. Although the major criteria of an acceptable plan are likely to reflect financial practicalities above all, this by itself will create legal issues because the interests of customers will be adverse to those of creditors and equity holders and because the costs of bringing the systems into full compliance with DER requirements may be prohibitive so long as the Utility operates as an independent company. Other issues of fair dealing will arise if the City proposes to acquire or absorb the systems, especially if as a consequence a substantial part of the Utility's facilities are abandoned and its investments therein effectively written off.

C. Possible Bankruptcy Filing

Our initial research indicates that nothing prevents a privately owned utility from becoming a debtor under the federal Bankruptcy Code, for purposes of either reorganization or liquidation. A federal bankruptcy proceeding may be preferable to a state court equity receivership as a means of reordering the Utility's affairs and debts and disposing of its properties. I believe that the Receiver should consider whether to submit such a recommendation to the court. This again raises the question of whether the Receiver has authority to act on behalf of the entire corporation or only certain of its properties. In the latter case, nothing would appear to prevent the Utility's present board of directors from authorizing, at any time in its discretion, the filing of a voluntary petition despite the state court proceeding. Regardless of who is empowered to act on behalf of the corporation, any creditor of the utility (including the lessor) that does not receive payment when and as due may be able to initiate an involuntary proceeding. These issues are potentially dispositive and should be examined more thoroughly at an early opportunity.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR OSCEOLA COUNTY, FLORIDA.

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL REGULATION,

Plaintiff,

vs.

KINGS POINT UTILITY, INC., WALTER LEE MEDLIN and WILLIAM R. WRIGHT, as Trustee,

Defendants,

vs.

ASH CHEMICAL, INC.,

Intervenor,

vs.

CITY OF KISSIMMEE,

Receiver.

CASE NO. 89-1764-CI

RECEIVED BY
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CITY MANAGERS OFFICE

FINAL JUDGMENT

This matter having come before the Court on Intervenor, Ash Chemical, Inc.'s Motion for Entry of Final Judgment after this Court's Final Judgment dated February 20, 1997 was reversed by the Fifth District Court of Appeal, and the Court having heard argument of counsel for Ash Chemical, Inc., and the City of Kissimmee, and being otherwise advised in the premises the Motion for Entry of Final Judgment is hereby granted.

IT IS HEREBY ADJUDGED that the Affirmative Defenses asserted by Receiver are denied.

IT IS HEREBY FURTHER ADJUDGED that Intervenor, Ash Chemical, Inc., whose address is 1403 Grandview Boulevard, Kissimmee,

Florida 34744 recover against City of Kissimmee, Receiver of the Kings Point Water and Sewer System the sum of $199,151 which represents rent due through August 1, 1996, plus prejudgment interest of $68,481 for which let execution issue. The Court reserves jurisdiction to award rent due since August 1, 1996, and the amount of attorneys fees.

ORDERED at Osceola County, Florida on December 8, 1998.

/s/ Ted Coleman

TED COLEMAN
Circuit Judge

Copies to:

Martin S. Friedman, Esquire
Don Smallwood, Esquire

king\fj

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, STATE OF FLORIDA
CIVIL DIVISION

STATE OF FLORIDA DEPT. OF
ENVIRONMENTAL REGULATION,

Plaintiff,

vs. Case No. CI 89-1764

KINGS POINT UTILITY, INC., WALTER
LEE MEDLIN, and WILLIAM R. WRIGHT,
as Trustee, et al.,

Defendants.
_____/

ORDER GRANTING MOTION FOR RECEIVER TO
INCREASE WATER AND SEWER RATES

THIS CAUSE coming on to be heard upon Intervenors's, *"Motion for Order for Receiver to Increase Water and Sewer Rates"*, and the court being advised in the premises,

IT IS ADJUDGED that:

1. The Motion for Order for Receiver to Increase Water and Sewer Rates is granted.

2 . The Receiver, CITY OF KISSIMMEE shall immediately, (after public hearing, if necessary), increase the water and sewer rates for the customers served by the receiver in this action to completely recover the sum of, $270,000.00, which includes the principal judgment amount of $267,632.00, plus some of the accrued interest, rendered in this action on December 18, 1998, for back rent due in favor of the intervenor, Ash Chemical, Inc., and for future rent.

3. The Receiver shall amortize the Final Judgment, entered in this action on December 18, 1998, over a 60 month period which is an approximate monthly amount of $5,694.21, and designate an additional monthly sum of $1,926.00, which represents the amount of the on-going

rental obligation of $1,800.00 monthly rent, plus the applicable 7% sales tax.

4. Monthly collection of these additional sums shall begin the next billing cycle after entry of this order and continue until further order of this Court. The sums collected from the customers shall be accountable by the Receiver for this purpose and all sums collected shall be held by the Receiver until such time as this Court orders the funds released to the Intervenor, Ash Chemical, Inc., in partial payment of the judgment or makes some other determination.

5. In the event the collection of the sums noted above, exceed those which the City of Kissimmee believes to be legally permitted to be collected by applicable Florida law, the City of Kissimmee, as Receiver, shall collect only those sums which the City of Kissimmee believes do not exceed the maximum permitted by law and notify this Court of its intentions to only collect those sums which it believes do not exceed applicable Florida law. Any party may submit this issue to the Court for further proceedings.

6. Execution, levy, garnishment and other forms of process for the collection of the Final Judgment in this action are stayed, pending the resolution of the appeal currently before the Fifth Circuit Court of Appeals in this action.

7. The Court continues to retain jurisdiction to determine, if applicable, an award of attorney fees and costs in this action.

ORDERED at Kissimmee, Osceola County, Florida on the 29 day of April, 1999.

CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to MARTIN S. FRIEDMAN, ESQUIRE, P.O. Box 1567, Tallahassee, FL 32302-1567; JACK CHISOLM, ESQUIRE, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, FL 32399-2400, DONALD T. SMALLWOOD, ESQUIRE, P.O. Box 421608, Kissimmee 34741-1608; KATHERINE E. GIDDINGS, ESQUIRE, Katz, Kutter, Haigler, Alderman, Bryant & Yon, P. A., P. O. Box 1877, Tallahassee, Florida, 32302-1877; RONALD M. HAND, ESQUIRE, 919 West Emmett Street, Kissimmee, FL 34741, this 6 day of April, 1999.

C:\WPDOCS\ORDERS\ASHPJ.ORD

James B. Gibson, Public Defender, Rebecca M. Becker, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David H. Foxman, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. *See Quince v. State*, 477 So.2d 535 (Fla.1985), *cert. denied*, 475 U.S. 1132, 106 S.Ct. 1662, 90 L.Ed.2d 204 (1986).

W. SHARP, GRIFFIN and THOMPSON, JJ., concur.

CITY OF KISSIMMEE, Appellant,

v.

DEPARTMENT OF ENVIRONMENTAL REGULATION, et al., Appellees.

No. 5D99-1504.

District Court of Appeal of Florida, Fifth District.

March 24, 2000.

Alleged successor owner-lessor of real property brought action against city-successor lessee, seeking eviction and unpaid rent on land which city, as receiver, occupied and used to operate waste water treatment plant. The Circuit Court, Osceola County, Ted P. Coleman, J., denied rent to lessor and lessor appealed. The District Court of Appeal, 706 So.2d 362, reversed and remanded. On remand, the trial court granted lessor's request for past rent with interest and the city appealed. The District Court of Appeal affirmed. Lessor then filed motion for order for city to increase water and sewer rates so as to recover monies due for past rent and to cover rent due under lease. The Circuit Court, Osceola County, John H. Adams, J., ruled in favor of lessor and entered order for city to increase water and sewer rates for city's customers to cover past rent and interest of $270,000. City appealed. The District Court of Appeal, Hill, M., Associate Judge, held that trial court did not abuse its discretion in ordering city to increase water and sewer rates of utility so as to recover money due for rent in order to protect customers serviced by utility.

Affirmed.

1. Municipal Corporations ⇐712(8)
Waters and Water Courses ⇐203(11)

Trial court did not abuse its discretion in ordering city, which was receiver of waste water treatment plant, to increase water and sewer rates of utility so as to recover money due for rent where city had failed to protect interest of customers serviced by utility by paying operational expense of rent, especially in light of fact that order of court gave city opportunity to have public hearing on issue to determine proper rate. West's F.S.A. §§ 180.191(1), 367.022(2).

2. Receivers ⇐110

Court which appoints a receiver may issue orders as are necessary and proper for the property and interests of those concerned.

3. Receivers ⇐152

Where an operating receivership in which the public has an interest is authorized, the expenses of operation take priority.

4. Municipal Corporations ⇐712(8)
Waters and Water Courses ⇐203(5)

Statute governing limitation on rates charged for consumers outside city limits did not apply to govern setting of utility water and sewer rates charged by city that

was court-appointed receiver for utility, since statute specifically stated that it applied to municipally owned sewer and water utilities and city did not own utility. West's F.S.A. § 180.191(1).

5. Municipal Corporations ⇐712(8)
Waters and Water Courses ⇐203(6)

City was exempt from rate regulation by Public Service Commission in setting sewer and water rates for utility for which city was court-appointed receiver, in light of statute exempting from such regulation any system owned, operated, managed, or controlled by government authorities. West's F.S.A. § 367.022(2).

Donald T. Smallwood, Kissimmee, and Katherine E. Giddings and Silvia Morell Alderman, of Katz, Kutter, Haigler, Alderman, Bryant & Yon, P.A., Tallahassee, for Appellant.

Martin S. Friedman of Rose, Sundstrom & Bentley, LLP, Tallahassee, for Appellee, Ash Chemical, Inc.

No Appearance for Appellee, Department of Environmental Regulation.

HILL, M., Associate Judge.

This is an appeal of a final order entered by the trial court directing the City of Kissimmee ("City"), as Receiver of Kings Point Utility, Inc. ("Utility"), to increase water and sewer rates in order to cover monthly rental expenses (current and past due) under a lease agreement with Ash Chemical, Inc. ("Ash Chemical").

The facts of this case are well known to this court since these parties have been before this court on two other occasions. We affirm the trial court's order based on the peculiar facts of this case, a concise background of which was set forth in the first appeal:

> Ash Chemical [brought an action] against the City of Kissimmee, seeking eviction and unpaid rent on premises which the City, as receiver, has occupied and used to operate a private utility servicing a subdivision in Osceola County, Florida. As receiver, the City was required, among other things, to "charge, collect and receive the payments and any other monies arising from the operation of the Kings Point Water and Sewer Systems and expend those monies as necessary for the operation, management and control of the systems."
>
> The City was appointed receiver of the utility in April, 1991, after the latter failed to correct a number of violations as determined by the Department of Environmental Regulation. Kings Point was leasing the real property upon which it had been operating the private utility. The lease of the utility property called for Kings Point to pay $1,800 per month to the lessor. At the time the City's receivership was instituted, the title holder of record of the realty upon which the utility was being operated by Kings Point was one William R. Wright, trustee. Subsequent to the appointment of the City as receiver in April, a deed was recorded on May 24, 1991, purportedly transferring title to the real property from Wright to Ash Chemical. The deed was dated in 1988 but referred to the 1990 lease from Wright to Kings Point.
>
> In 1995, Ash Chemical, as the alleged successor owner (and lessor) of the property, moved to intervene in the receivership action. Ash Chemical claimed that the property was leased to Kings Point Utility in 1990 and that the City of Kissimmee, as the successor lessee of the property by dint of the receivership, had failed to make rental payments due since August 1, 1991. Ash Chemical sought eviction of the City and all past due rent.

Ash Chemical, Inc. v. Dep't of Environmental Regulation, 706 So.2d 362, 363 (Fla. 5th DCA 1998). A hearing was held on the matter, following which the trial court denied rent to Ash Chemical, concluding that the subject lease was a sham

and that the lease and deed purporting to transfer title to Ash Chemical were probably executed for the purpose of committing a fraud upon the court. Ash Chemical appealed and this court held that because fraud was not pled by the City as an affirmative defense, the trial court's final judgment based upon the City's claim of fraud violated Ash Chemical's right to due process. *Id.* at 363–64. This court further remanded with instructions to reconsider the claim of Ash Chemical in regard to back rent based upon the record evidence adduced at the hearing. *Id.* at 364. On remand, after a review of the evidence adduced at that earlier hearing, the trial court found that the City failed to prove its affirmative defenses of laches and waiver, and granted Ash Chemical's request for past rent with interest. The City then appealed Ash Chemical's judgment for past rent with interest, and this court affirmed the trial court's judgment and award of damages for Ash Chemical. *City of Kissimmee v. Ash Chemical, Inc.*, (Fla. 5th DCA 1999). Ash Chemical then filed a "Motion for Order for Receiver to Increase Water and Sewer Rates" in the lower court. The substance of this motion was a plea for an order directing the City to increase the water and sewer rates for the Utility so as to recover the monies due for past rent and to cover on-going monthly rent due under the lease. The trial court heard arguments of counsel but heard no evidence regarding whether the then-current rate structure was fair and equitable. The trial court ruled in favor of Ash Chemical and entered an order which reads in part:

> 2. The Receiver, CITY OF KISSIMMEE shall immediately, (after public hearing, if necessary), increase the water and sewer rates for the customers served by the receiver in this action to completely cover the sum of $270,000 which includes the principal judgment amount of $267,632.00 plus some of the accrued interest....

This appeal ensued. The central issue on appeal is whether the trial court erred in ordering the City, as Receiver, to raise the water and sewer rates of the Utility.

[1–3] The City contends that the trial court was without jurisdiction to set utility rates, citing to decisions which generally refer to the setting of rates under Chapter 180 as a legislative function. *E.g., Mohme v. City of Cocoa*, 328 So.2d 422 (Fla.1976). The City admits, however, that there are no reported opinions discussing the issue of setting utility rates under the peculiar type of facts found in this case—where a utility is placed into receivership. As court-appointed Receiver, the City is required to operate, manage and control the Utility for the benefit of the customers serviced. This logically includes paying its lessor any rents due and owing under the lease to prevent possible eviction of the Utility for non-payment of rent, thereby putting customers in jeopardy. The City has not fulfilled its duty as Receiver as it has yet to pay the operational expense of rent. Since the City has failed to protect the interest of the customers serviced, we find the trial court was within its discretion in taking action at the request of Ash Chemical to insure that the operational expense of rent would be subsequently accounted for. It is well established that the court which appoints a receiver may issue orders as are necessary and proper for the property and interests of those concerned. *Hood v. Ocklawaha Valley R. Co.*, 78 Fla. 659, 84 So. 97 (1920); *Puma Enterprises Corp. v. Vitale*, 566 So.2d 1343 (Fla. 3d DCA 1990). Moreover, where an operating receivership in which the public has an interest is authorized, the expenses of operation take priority. 44 Fla. Jur.2d, Receivers § 76. *See also, Knickerbocker Trust Co. v. Green Bay Phosphate Co.*, 62 Fla. 519, 56 So. 699, 701–02 (1911).

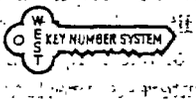
[4, 5] Notwithstanding, the City asserts that the provisions of Chapter 180, Florida Statutes (1999) which govern municipal public works apply and that rates must be set pursuant to subsection 180.191(1). However, subsection

180.191(1) is not applicable in this case, as subsection (3) of section 180.191 specifically provides that, "[t]his section shall apply to municipally owned water and sewer utilities...." The City is not the owner of the Utility; it is the court-appointed receiver. Similarly, the City is exempt from rate regulation by the Public Service Commission under Chapter 367, Florida Statutes (1999), by virtue of subsection 367.022(2), which exempts "systems owned, operated, managed, or controlled by government authorities...."

In sum, we find the trial court did not abuse its discretion in ordering the City to increase the water and sewer rates of the Utility so as to recover money due for rent, especially in light of the fact that the order of the trial court gave the City an opportunity to have a public hearing on the issue to determine the proper rate.

AFFIRMED.

COBB and GRIFFIN, JJ., concur.



Randolph J. NORWOOD, Appellant,

v.

STATE of Florida, Appellee.

No. 5D99-2100.

District Court of Appeal of Florida, Fifth District.

March 24, 2000.

Appeal from the Circuit Court for Orange County, Stan A. Strickland, Judge.

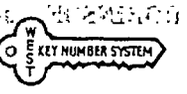
James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. *See Speed v. State*, 732 So.2d 17 (Fla. 5th DCA), *rev. granted*, 743 So.2d 15 (Fla.1999).

DAUKSCH, COBB and W. SHARP, JJ., concur.



James M. ROGERS, Appellant,

v.

STATE of Florida, Appellee.

No. 5D99-2155.

District Court of Appeal of Florida, Fifth District.

March 24, 2000.

Appeal from the Circuit Court for Orange County, Stan A. Strickland, Judge.

James B. Gibson, Public Defender, and John M. Selden, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. *See Bratcher v. State*, 727 So.2d 1114 (Fla. 5th DCA 1999); *Davis v. State*, 710 So.2d 635 (Fla. 5th DCA 1998);

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT
OF ENVIRONMENTAL REGULATION,

Plaintiff,

vs. Case No. CI 89-1764

KING'S POINT UTILITY, INC.,
WALTER LEE MEDLIN and
WILLIAM R. WRIGHT, as Trustee,

Defendants.

vs.

ASH CHEMICAL, INC.

Intervenor,

CITY OF KISSIMMEE, as
Receiver,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE having come before the Court on Intervenor, ASH CHEMICAL, INC.'s *Amended Motion to Determine Rent Due from August 1, 1996 through December 31, 1999 and Demand for Payment* and the Court having considered the evidence presented and the argument of counsel, and being otherwise advised in the premises, the Motion is hereby granted.

IT IS HEREBY ORDERED AND ADJUDGED, that Intervenor, ASH CHEMICAL, INC. whose address is: 1403 Grandview Boulevard, Kissimmee, Florida 34744, shall recover against the CITY OF KISSIMMEE, Receiver of King's Point Utility, Inc. the additional sum of

$154,080.00, which represents rent due from September 1, 1996 through December 31, 1999, plus prejudgment interest of $43,174.00 through January 31, 2001, for a total of **$197,254.00**, for which let execution issue.

2. The Court retains jurisdiction to determine and award the amount of attorney fees and costs.

DONE AND ORDERED at Kissimmee, Osceola County, Florida on this the 31st day of January, 2001.

/s/ JOHN H. ADAMS, SR.

Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U. S. Mail, postage prepaid to: MARTIN S. FRIEDMAN, Esquire, Rose, Sundstrum & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301; JAMES M. SPOONHOUR, ESQUIRE, Lowndes, Drosdick, Doster, Kantor & Reed, P. A.; KATHELYN JACQUES-ADAMS, Esquire, 3900 Commonwealth Boulevard, MS35, Tallahassee, FL 32399-3000; KATHERINE E. GIDDINGS, Esquire, Katz. Kutter, Haigler, et al, P. O. Box 1877, Tallahassee, Florida 32303-1877; DONALD T. SMALLWOOD, Esquire, 101 N. Church Street, Kissimmee, Florida 34741; RONALD M. HAND, ESQUIRE, 921 W. Emmett Street, Kissimmee, Florida 34741 on this the 31st day of January, 2001.

/s/ RMH

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT
OF ENVIRONMENTAL REGULATION,

Plaintiff,

vs.

KING'S POINT UTILITY, INC.,
WALTER LEE MEDLIN and
WILLIAM R. WRIGHT, as Trustee,

Defendants.

vs.

ASH CHEMICAL, INC.

Intervenor,

CITY OF KISSIMMEE, as
Receiver,

Defendant.
_____/

RECEIVED
JUL 02 2001
Rose Sundstrom & Bentley, LLP

Case No. CI 89-1764

FINAL JUDGMENT FOR ATTORNEY FEES AND COSTS

THIS CAUSE having come before the Court on Intervenor, ASH CHEMICAL, INC.'s *Amended Motion to Assess Attorney Fees* and the Court having considered the evidence presented and the argument of counsel, and being otherwise advised in the premises, the Motion is hereby granted.

IT IS HEREBY ORDERED AND ADJUDGED, as follows:

1. The court finds that the sum of $ 52,801.85 as reasonable attorney's fees and costs for the work performed on behalf of the Intervenor, ASH CHEMICAL, INC.'s counsel

in this action.

2. The City of Kissimmee, as Receiver, is hereby ordered to ~~promptly~~ pay from funds held by the Receiver on behalf of defendant, KING'S POINT UTILITY, INC., directly to Intervenor's counsel, without resort to the Registry of this Court, the sum of $52,801.85 as reasonable attorney fees and costs in this action.

DONE AND ORDERED at Kissimmee, Osceola County, Florida on this the 24th day of ~~January~~, 2001.

/s/ JOHN H. ADAMS, SR.

Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U. S. Mail, postage prepaid to: MARTIN S. FRIEDMAN, Esquire, Rose, Sundstrum & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301; JAMES M. SPOONHOUR, ESQUIRE, Lowndes, Drosdick, Doster, Kantor & Reed, P. A., 215 N. Eola Drive, Orlando, Florida 32801; KATHELYN JACQUES-ADAMS, Esquire, 3900 Commonwealth Boulevard, MS35, Tallahassee, FL 32399-3000; KATHERINE E. GIDDINGS, Esquire, Katz. Kutter, Haigler, et al, P. O. Box 1877, Tallahassee, Florida 32303-1877; DONALD T. SMALLWOOD, Esquire, 101 N. Church Street, Kissimmee, Florida 34741; RONALD M. HAND, ESQUIRE, 921 W. Emmett Street, Kissimmee, Florida 34741 on this the 24th day of ~~January~~, 2001.

/S/ RMH

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COPY

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR OSCEOLA COUNTY, FLORIDA

CIVIL DIVISION
CASE NO. CI-89-1764

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL REGULATION,

PLAINTIFF,

-VS-

KINGS POINT UTILITY, INC., WALTER LEE MEDLIN AND WILLIAM R. WRIGHT, AS TRUSTEE,

DEFENDANTS,

AND

ASH CHEMICAL, INC.,

DEFENDANT,

-VS-

CITY OF KISSIMMEE,

RECEIVER.
_____/

TRANSCRIPT OF PROCEEDINGS HELD ON JUNE 28, 2001, COMMENCING AT 1:57 P.M. IN THE OSCEOLA COUNTY COURTHOUSE, KISSIMMEE, FLORIDA, BEFORE THE HONORABLE JOHN H. ADAMS, SR., CIRCUIT COURT JUDGE.

OSCEOLA COURT REPORTERS
316 NORTH JOHN YOUNG PARKWAY, SUITE 9
KISSIMMEE, FLORIDA 34741
(407)847-0330

A P P E A R A N C E S:

KATHERINE E. GIDDINGS, ESQ. OF: KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YON, P.A., 106 EAST COLLEGE AVENUE, SUITE 1800, TALLAHASSEE, FL 32301; ON BEHALF OF PLAINTIFF.

DONALD T. SMALLWOOD, ESQ., CITY ATTORNEY, 101 NORTH CHURCH STREET, KISSIMMEE, FL 34741; ON BEHALF OF PLAINTIFF.

JAMES M. SPOONHOUR, ESQ. OF: LOWNDES, DROSDICK, DOSTER, KANTOR & REED, P.A., POST OFFICE BOX 2809, ORLANDO, FL 32802; ON BEHALF OF DEFENDANT KINGS POINT.

MARTIN S. FRIEDMAN, ESQ. OF: ROSE, SUNDSTROM & BENTLEY, LLP, 2548 BLAIRSTONE PINES DRIVE, TALLAHASSEE, FL 32301; ON BEHALF OF DEFENDANT KINGS POINT.

RONALD M. HAND, ESQ. OF: HOEQUIST & HAND, 919 EMMETT STREET, KISSIMMEE, FL 34741; ON BEHALF OF DEFENDANT ASH CHEMICAL.

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they're going to be a private utility, get licensed, get rates approved. The problem with the scenario suggested by Ms. Giddings is it's got two parts. One is tell Kings Point get that application in and get going. No problem there. We'll agree to that, Judge.

Problem two is her second suggestion is that let's don't deal with the rates, let's let the PSC set it. We've got to get through the approval process, get recertified and then submit for rates. And that could be however long it takes, a year, two years. In the meantime, we're letting the hole get bigger and bigger and I don't think we should do that.

MR. SMALLWOOD: Judge, I will say this right now: The City of Kissimmee, I can tell you right now, is not -- we're not going to be interested in buying this utility. It just ain't going to happen. I can tell you this right now. The City Manager has already told me because of the accusations, we -- there is no way we're ever going to be interested in trying to have anyone accuse us that we did any self-dealing at all. And he ain't going to do it.

Well, Mr. Friedman laughs, but, you know, they allude all accusations at us, and Mr. Durbin has already said we're not going to do that; we don't even want the appearance. So we're not a viable alternative. But I'll tell you what a viable alternative is that does away with all this debt and this increase is that gentleman sitting right there that represents Ash Chemical. Let that judgment creditor take it. He's got the assets now. He's got a viable utility.

MR. SPOONHOUR: He'd have to be licensed by the PSC.

MR. SMALLWOOD: No different than Kings Point Utility. But my point being is you ain't sitting there dealing with this big judgment. And as the judge said before, Mr. Medlin who's wearing one hat and Ash Chemical wearing the other hat, those two guys ought to get together and work out a deal and it solves the taxpayers' problems. It solves the residents' problems and it solves these two, quote, corporation problems, which I think was explicit today who's running the show on both of them.

MR. SPOONHOUR: Judge, one thing I might