



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED - FPSC
DEC 5 AM 10:41
COMMISSION CLERK

DATE: DECEMBER 5, 2002
TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK ADMINISTRATIVE SERVICES (BAYÓ)
FROM: OFFICE OF THE GENERAL COUNSEL (JAEGER)
DIVISION OF ECONOMIC REGULATION (KAPROTH, PEACOCK)
DIVISION OF COMMISSION CLERK AND ADMINISTRATIVE SERVICES (KNIGHT)
RE: DOCKET NO. 021035-SU - DISPOSITION OF DELINQUENT REGULATORY ASSESSMENT FEES AND DELINQUENT ANNUAL REPORTS AND PENALTIES FOR WEBER INVESTMENT CORPORATION IN PUTNAM COUNTY AND SAND DOLLAR PROPERTIES, INC. IN LEE COUNTY.
AGENDA: 12/17/02 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE
CRITICAL DATES: NONE
SPECIAL INSTRUCTIONS: NONE
FILE NAME AND LOCATION: S:\PSC\GCL\WP\021035.RCM

CASE BACKGROUND

Sand Dollar Properties, Inc. (Sand Dollar) has failed to file its annual report for 1996 and regulatory assessment fees (RAFs) from May 1993 through 1996 as required by Order No. PSC-97-0833-FOF-SU, issued July 11, 1997, in Docket No. 960063-SU. Also, Weber Investment Corporation (Weber) has failed to file its annual reports from 1993 through June 4, 1996, and failed to pay its RAFs for the years 1992 through June 4, 1996, as required by Order No. PSC-98-0446-FOF-WS, issued March 30, 1998, in Docket No. 980271-WS. Both Sand Dollar and Weber were Class C utilities. Sand Dollar is an exempt entity, but was not found to be exempt until 1997. Weber abandoned the utility giving notice on May 13, 1996, and Putnam County was appointed as receiver on June 4, 1996.

DOCUMENT NUMBER 021035

13287 DEC-5 8

FPSC-COMMISSION CLERK

Rule 25-30.110, Florida Administrative Code, requires utilities subject to the Commission's jurisdiction as of December 31 of each year to file an annual report on or before March 31 of the following year. Pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to timely file a complete annual report is subject to penalties (\$3 per day late for Class C utilities), absent demonstration of good cause for noncompliance.

Pursuant to Rule 25-30.120(2), Florida Administrative Code, the obligation to remit the RAF for any year shall apply to any utility which was subject to this Commission's jurisdiction on or before December 31 of that year. A small percentage of utilities, usually Class C, do not pay their RAFs each year. Often these utilities are bought by larger utilities, acquired by governmental entities, abandoned, or become exempt. The transfer of these utilities makes it difficult for the Commission to track, let alone collect, the delinquent RAFs. Further, pursuant to Section 350.113(4), Florida Statutes, and Rule 25-30.120(7), Florida Administrative Code, a statutory penalty plus interest shall be assessed against any utility that fails to timely pay its RAFs. In addition, pursuant to Sections 367.145(1)(b) and 367.161, Florida Statutes, and Rule 25-30.120(7)(b), Florida Administrative Code, the Commission may impose an additional penalty upon a utility for failure to pay RAFs in a timely manner.

This docket was opened in order for staff to address this failure of Sand Dollar and Weber to file annual reports and pay outstanding RAFs, plus any applicable penalties and interest. Generally, unpaid RAFs are calculated based on the annual report for the year RAFs were due. Revenues reported would be multiplied by the applicable RAF rate. However, in this case neither utility had an annual report on file for the year RAFs were due. Therefore, for Weber, staff estimated the revenues and resulting RAFs due based on a prior year annual report. Also, for Sand Dollar, the Commission had previously determined that there were no applicable revenues, and staff used the applicable minimum annual RAF of \$25 for wastewater for each of the years in question. See Rule 25-30.120(1), Florida Administrative Code. For the years in question, staff calculated the penalties and interest, in accordance with Rule 25-30.120(7)(a), Florida Administrative Code, based on the number of days that have elapsed since the respective RAFs were due and the date of this agenda conference. The RAF,

DOCKET NO. 021035-SU
DATE: DECEMBER 5, 2002

penalties, and interest each utility owes by year is detailed in the staff analysis for each utility.

This recommendation specifically addresses whether Sand Dollar or Weber should be ordered to show cause, in writing, within 21 days, why each utility should not be fined for failure to comply with Rule 25-30.110(3)(a), Florida Administrative Code, whether the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should be assessed against each utility, whether each utility should be required to file annual reports for the years indicated, and whether Sand Dollar and Weber should be ordered to show cause, in writing, within 21 days, why they should not remit RAFs, statutory penalties, and interest in their respective amounts for their apparent violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to pay delinquent RAFs.

Although these utilities are no longer regulated by the Commission, the Commission maintains jurisdiction to pursue collection efforts for the failure to file annual reports and timely pay RAFs pursuant to Sections 367.071(2), 367.145, 367.161, and 367.171(5), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Sand Dollar Properties, Inc., and Weber Investment Corporation be ordered to show cause, in writing, within 21 days, why they should not be fined for failure to file their annual reports for the years indicated in apparent violation of Rule 25-30.110(3), Florida Administrative Code?

RECOMMENDATION: No. Show cause proceedings should not be initiated. Staff further recommends that the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should not be assessed, as the information contained in the delinquent reports is no longer needed for the ongoing regulation of the utilities. In addition, both Weber and Sand Dollar should not be required to file the annual reports for the years designated. (JAEGER, PEACOCK)

STAFF ANALYSIS: Rule 25-30.110(3), Florida Administrative Code, requires utilities subject to Commission jurisdiction as of December 31 of each year to file an annual report on or before March 31 of the following year. Annual reports are considered filed on the day they are postmarked or received by the Commission. Both Sand Dollar and Weber are in apparent violation of Rule 25-30.110(3), Florida Administrative Code, for their failure to file annual reports. Pursuant to Order No. PSC-97-0833-FOF-SU, Sand Dollar should have filed an annual report for 1996. Pursuant to Order No. PSC-98-0446-FOF-WS, Weber should have filed annual reports for the years 1993 through June 4, 1996.

Before staff proceeds with its analysis on this issue, staff believes that a brief history of each delinquent utility would assist the Commission in determining whether a show cause proceeding and the imposition of fines, penalties, and interest are appropriate for the failure of these utilities to file annual reports.

DELINQUENT UTILITIES

1) Sand Dollar Properties, Inc.

Capital Sunbelt/Fund '84 Ltd. (Capital Sunbelt) provided wastewater service as a Class C utility in Lee County. The system was originally certificated as Fort Myers Beach Campground Utilities, Inc. (FMBC), and was granted Certificate No. 271-S. On February 5, 1985, Order No. 14060 approved the transfer of

Certificate No. 271-S from FMBC to Capital Sunbelt. On June 28, 1988, Capital Sunbelt entered into an agreement with Lee County (County) to receive bulk wastewater service from the County. Pursuant to this agreement, Capital Sunbelt dismantled its treatment plant. Currently, only the collection lines are in operation.

In May, 1993, Sand Dollar Properties, Inc. (Sand Dollar) acquired the wastewater facilities from Capital Sunbelt through a transaction similar to a foreclosure proceeding; via a default on the loan commitment. Capital Sunbelt defaulted on its loan commitments and Sand Dollar, with Harry Cutcher as its principal, accepted a quitclaim deed in lieu of foreclosure on the wastewater facilities. Because the utility was acquired through a default of Capital Sunbelt, there was no contract for sale. Instead the two parties executed a quitclaim deed on May 5, 1993, which purported to transfer all of Capital Sunbelt's rights, title, interest, and claim in the property on which the facility was located to Sand Dollar. At the time of this transfer, the wastewater treatment facility had not been operational for five years prior due to the interconnection with Lee County in 1988.

On January 17, 1996, Capital Sunbelt applied for a transfer of Capital Sunbelt's wastewater system (Wastewater Certificate No. 271-S in Lee County) to Sand Dollar. Based on the campground's method of operating, Sand Dollar requested that it be found to be exempt pursuant to Section 367.022(5), Florida Statutes (landlord/tenant exemption). The last available annual report for 1992, shows that the annual operating revenue for the system was \$0 and the net operating loss was \$13,987.

In the Order approving the transfer (Order No. PSC-97-0833-FOF-SU), the Commission noted:

Sand Dollar has operated the wastewater system since May, 1993. Pursuant to Section 367.145, Florida Statutes, each utility is responsible for paying annual regulatory assessment fees. Therefore, Sand Dollar shall be put on notice that it will be responsible for filing a 1996 annual report and for payment of all outstanding regulatory assessment fees from May, 1993 through 1996. The collection of regulatory assessment fees shall be addressed in a separate docket.

In that same Order, the Commission further noted that:

Sand Dollar has requested recognition as an exempt entity pursuant to Section 367.022(5), Florida Statutes (the landlord/tenant exemption). According to the . . . owner of Sand Dollar Properties and FMBC, the wastewater service is being provided to the tenants of the FMBC without specific compensation. . . . Section 367.022(5), Florida Statutes, states that landlords providing service to their tenants without specific compensation for the service are exempt from our regulation.

The Commission also noted that "the statute was changed on July 1, 1996 to allow exemptions to become self-executing," but that "this case was filed prior to the statute's effective date." Therefore, the Commission recognized that Sand Dollar was an exempt utility, and canceled Certificate No. 271-S.

By letter dated June 4, 1997, staff attempted to collect the delinquent RAFs for 1996. However, that letter was sent to Capital Sunbelt and not Sand Dollar. Therefore, on October 28, 2002, after the opening of this docket, staff sent another letter to Sand Dollar attempting to collect all past due RAFs, penalties, and interest. However, as of December 5, 2002, the date this recommendation was filed, staff had received no response to this latter letter.

2) Weber Investment Corporation

Although Weber had been operating since 1972, the Commission did not learn of its existence until October 1992. On June 29, 1994, by Order No. PSC-94-0805-FOF-SU, the Commission granted Weber Certificate No. 491-S.

On May 13, 1996, pursuant to Section 367.165, Florida Statutes, Weber gave notice of abandonment. On June 4, 1996, the Circuit Court of the Seventh Judicial Circuit appointed Putnam County as interim receiver, and the County immediately took over operation of the utility. By Order No. PSC-96-1087-FOF-SU, issued August 23, 1996, in Docket No. 960800-SU, the Commission acknowledged the abandonment and appointment, and further acknowledged that Putnam County was exempt from regulation.

Moreover, by Order No. PSC-98-0446-FOF-WS, the Commission stated as follows:

Pursuant to Rule 25-30.110, Florida Administrative Code, Weber was responsible for filing annual reports while operating under our jurisdiction. Likewise, pursuant to Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, Weber was responsible for paying regulatory assessment fees during that period. Weber failed to file annual reports for 1993 through June 4, 1996. Weber also failed to pay regulatory assessment fees for 1992 through June 4, 1996. Weber's obligation to file annual reports and pay regulatory assessment fees ended on June 4, 1996 when Putnam County was appointed receiver. Putnam County does not owe regulatory assessment fees because it is exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes.

Based on the foregoing, we find that Weber Investment Corporation is responsible for filing annual reports and paying regulatory assessment fees, as set forth above. We will address the collection of these reports and fees, including appropriate penalties and interest, in a separate docket after internal collection efforts are attempted.

By letter dated June 4, 1997, staff attempted to collect the delinquent RAFs for 1996. However, staff never received any response to this letter.

SHOW CAUSE PROCEEDING, NEED FOR ANNUAL REPORTS, AND
APPROPRIATENESS OF PENALTIES AND INTEREST

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utilities' failure to timely file annual reports, 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, Florida Administrative Code, Relating To Tax Savings Refund For 1988 and

1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "in our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes.

Moreover, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to file a timely, complete annual report is subject to penalties, absent demonstration of good cause for noncompliance. The penalty set out in Rule 25-30.110(7), Florida Administrative Code, for Class C utilities is \$3 per day, based on the number of calendar days elapsed from March 31, or from an approved extended filing date. Using this \$3 figure and multiplying by the number of days from the time the annual report(s) were due through this December 17, 2002 Agenda Conference, staff calculates that the total penalty for Sand Dollar's annual report for the year 1996 would be \$6,261.

SAND DOLLAR

YEAR	CALCULATION	AMOUNT
1996	2,087 x \$3/day	\$6,261
	TOTAL DUE	\$6,261

Using this same procedure for Weber's annual reports for the years 1993 through June 4, 1996, staff calculates that the total penalty would be \$31,620.

WEBER

YEAR	CALCULATION	AMOUNT
1993	3,183 x \$3/day	\$9,549
1994	2,818 x \$3/day	\$8,454
1995	2,452 x \$3/day	\$7,356
1996	2,087 x \$3/day	\$6,261

	TOTAL DUE	\$31,620
--	------------------	-----------------

These penalties, if assessed, would continue to accrue until such time as Sand Dollar and Weber file their annual reports for the respective years. Staff notes that pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, the Commission may, in its discretion, impose greater or lesser penalties for such noncompliance.

Staff believes, however, that the circumstances in these cases are such that show cause proceedings should not be initiated at this time, nor should penalties be assessed. As discussed above, Sand Dollar has always operated the utility such that it would be exempt pursuant to Section 367.022(5), Florida Statutes (landlords providing service to their tenants without specific compensation for the service). Moreover, pursuant to Weber's notice of abandonment, Putnam County was appointed receiver and began its receivership on June 4, 1996. By order No. PSC-96-1087-FOF-SU, issued August 23, 1996, in Docket No. 960800-SU, the Commission acknowledged the abandonment and appointment, and further acknowledged that Putnam County was exempt from regulation. Also, by Order No. PSC-98-0446-FOF-WS, issued March 30, 1998, the Commission canceled Certificate No. 491-S. In addition, the Commission acknowledged that pursuant to Section 367.022(2), Florida Statutes, utility systems owned, managed, or controlled by governmental authorities are exempt from the Commission's regulation. Because these utilities are no longer subject to Commission regulation, the information contained in the annual reports for the years indicated are no longer needed by the Commission. Finally, staff believes that it would be futile to attempt any further collection efforts.

For the foregoing reasons, staff does not believe that the apparent violation of Rule 25-30.110(3), Florida Administrative Code, rises in these circumstances to the level of warranting the initiation of a show cause proceeding. Therefore, staff recommends that the Commission order neither Sand Dollar nor Weber to show cause, in writing within 21 days, why they should not be fined for their failure to file annual reports for the years indicated. Staff further recommends that the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should not be assessed, as the information contained in the delinquent reports is no longer needed for the ongoing regulation of the utilities. Additionally,

DOCKET NO. 021035-SU
DATE: DECEMBER 5, 2002

staff recommends that neither Sand Dollar nor Weber be required to file their annual reports for the years indicated.

ISSUE 2: Should Sand Dollar and Weber be ordered to show cause, in writing, within 21 days, why they should not remit RAFs, statutory penalties, and interest in their respective amounts for their apparent violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to pay delinquent regulatory assessment fees (RAFs)?

RECOMMENDATION: No. Show cause proceedings should not be initiated. Staff further recommends that the Commission refer the utilities' unpaid RAFs and associated penalties and interest to the State Comptroller's Office, Department of Banking and Finance, for permission to write off the accounts as uncollectible, in the amounts identified in the staff analysis. (JAEGER, KAPROTH, KNIGHT)

STAFF ANALYSIS: In establishing rates, the Commission includes in its determination of the revenue requirements the utility's obligation to pay RAFs. However, as noted in Issue 1 above, both Sand Dollar and Weber failed to pay RAFs for the years indicated. Although one utility was abandoned and the other one has now been determined to be exempt, the delinquent utilities remain responsible for those fees pursuant to Section 367.071(2), Florida Statutes.

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

1. 5% 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%.
2. The amount of interest to be charged is 1% for each 30 days or fraction thereof, not to exceed a total of 12% per annum.

As noted in Issue 1 above, pursuant to Order No. PSC-97-0833-FOF-SU, the Commission determined that the transfer from Capital Sunbelt to Sand Dollar should be approved. However, that same Order, despite recognizing that Sand Dollar would be exempt on a going forward basis, determined that Sand Dollar would remain

responsible for payment of all outstanding RAFs from May, 1993 through 1996, the collection of which would be addressed in a separate docket. Moreover, by Order No. PSC-98-0446-FOF-WS, the Commission found that Weber, having abandoned the utility, remained responsible for paying RAFs for 1992 through June 4, 1996.

Staff's calculation of the RAFs, plus penalty and interest for each of the utilities for the periods indicated above is set out below. As of December 31, 2002, the amounts due would be as follows:

SAND DOLLAR

<u>RAF*</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$100	\$25	\$87	\$212

*Pursuant to Order No. PSC-97-0833-FOF-SU, there were no water and wastewater revenues for the period in question. Therefore, the minimum amount would be assessed for all four years.

WEBER

<u>RAF*</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$2,785.68	\$696.42	\$2,678.98	\$6,161.08

*Based on estimated revenue in 1992 pursuant to Order No. PSC-98-0446-FOF-WS, and for years 1992 through June 4, 1996.

RESPONSIBILITY FOR REGULATORY ASSESSMENT FEES

Regulatory assessment fees are intended to cover the costs incurred by this Commission in the regulation of utilities. Despite Sand Dollar and Weber having been found by this Commission to be responsible for the RAFs for the times indicated, neither utility has paid the RAFs which are now past due.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utilities' failure to pay RAFs, plus applicable penalties and interest, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL

titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Staff believes that the utilities' failure to pay RAFs rises to a level that would ordinarily warrant a show cause proceeding. However, Sand Dollar was found to be exempt from this Commission's jurisdiction as of the end of 1996, and it appears that the Commission has little leverage that it can use against Sand Dollar.

Moreover, Weber is an abandonment case and Weber's corporate entity has been dissolved. Under certain conditions, the directors and shareholders of a dissolved corporation could be held responsible for a distribution of funds prior to the payment of RAFs. Section 607.06401(3), Florida Statutes, provides in pertinent part:

No distribution may be made, if after giving it effect:
(a) The corporation would not be able to pay its debts as they become due in the usual course of business

Section 607.0834(1), Florida Statutes, provides in pertinent part:

A director who votes for or assents to a distribution made in violation of s. 607.06401 . . . is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating s. 607.06401 . . . if it is established that he did not perform his duties in compliance with s. 607.0830.

To hold a director liable under Section 607.0830, Florida Statutes, it must essentially be shown that the director made the unlawful distribution in bad faith. Furthermore, for a director to be held liable for an unlawful distribution, a proceeding must be "commenced within 2 years after the date on which the effect of the distribution was measured" Section 607.0834(3), Florida Statutes. In this case, staff does not know when distributions were made. Therefore, it is unclear when the time began to run for holding the directors liable. However, Weber was dissolved on

September 22, 2001, and it would appear that a proceeding against the directors would not be barred. However, because this was an abandonment, it is doubtful whether there was any distribution whatsoever.

Section 607.1406(13), Florida Statutes, provides that a shareholder of a dissolved corporation is not liable for any claim against the corporation which is brought after three years of the effective date of dissolution. Therefore, a proceeding against the shareholders could also still be commenced. However, because Weber is an abandonment and it appears that the County took over all assets of the utility, it appears that there could be very little that could have been distributed to the shareholders.

Based on the foregoing, staff believes that a show cause proceeding and further collection efforts would not be cost effective. Staff has already made attempts by letters dated June 7, 1997, to collect the delinquent RAFs, penalties and interest due for the year 1996 from Sand Dollar and for the years 1992 through June 4, 1996 for Weber. However, staff noted that one letter was inadvertently mailed to Capital Sunbelt's old address and not to Sand Dollar. Therefore, on October 28, 2002, staff mailed a second letter to Sand Dollar attempting to collect all past due RAFs from that utility. Staff believes that any further attempts to collect would be futile because, in these instances, the utilities' corporate entities either no longer exist or are not subject to this Commission's regulation.

Therefore, staff recommends that show cause proceedings not be initiated against the aforementioned utilities for failure to pay RAFs. Staff further recommends that the Commission refer this matter to the State Comptroller's Office, Department of Banking and Finance, for permission to write off these accounts as uncollectible.

DOCKET NO. 021035-SU
DATE: DECEMBER 5, 2002

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. Because no further action is necessary, this docket should be closed. (JAEGER, KNIGHT, PEACOCK, KAPROTH)

STAFF ANALYSIS: Because no further action is necessary, this docket should be closed.