

State of Florida



Public Service Commission

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DATE: May 20, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Rodan) *JAR*
Division of Economic Regulation (Kaproth) *KK JS JOJ 198*

RE: Docket No. 040248-WU – Initiation of show cause proceedings against Kincaid Hills Water Company in Alachua County for violation of Rule 25-30.110, F.A.C., Records and Reports; Annual Reports, and Rule 25-30.120, F.A.C., Regulatory Assessment Fees; Water and Wastewater Utilities.
County: Alachua

AGENDA: 06/01/04 – Regular Agenda – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040248.RCM.DOC

Case Background

Kincaid Hills Water Company (Kincaid or utility) is a Class C water utility located in Alachua County. Kincaid became subject to Commission jurisdiction and was granted a certificate of operation by Order. No. PSC-93-1027-FOF-WU, issued July 13, 1993, Docket No. 921195-WU, In Re: Application for certificate to provide water service in Alachua County under grandfather rights by Kincaid Hills Water Company. In its 2003 annual report, the utility reported water operating revenues of \$42,008, with a net operating loss of \$11,559.00.

Kincaid filed its annual reports for the years 1998-2001 on September 18, 2002, and filed its annual reports for 2002 and 2003 on May 11, 2004. The penalty owed for late filing the 1998-2001 annual reports on September 18, 2002, is \$8,625.00. The penalty owed for late filing the 2002 annual report is \$1,221.00. On March 31, 2004, Kincaid requested a 30 day extension to file its 2003 annual report; thus, the 2003 annual report became past due on April 30, 2004. The penalty owed for late filing the 2003 annual report is \$33.00. Kincaid has a history of failing to file annual reports in a timely manner. In Order No. PSC-98-0737-SC-WU, issued

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May 28, 1998, Docket No. 971623-WU, In Re: Initiation of show cause proceedings against Kincaid Hills Water Company in Alachua County for violation of Rule 25-30.110(3), F.A.C., Records and Reports; Annual Reports, Kincaid was ordered to show cause for failure to timely file 1995 and 1996 annual reports and payment of associated penalties. Kincaid failed to respond to the show cause order and the docket was closed upon the Office of Comptroller granting the Commission permission to write off uncollected claims totaling \$6,996.12.

In addition, Kincaid has failed to pay regulatory assessment fees (RAFs) for the years 1995-2003. The RAFs, plus associated penalties and interest, owed for the periods indicated are \$29,231.42.

Commission staff learned that the Florida Department of Environmental Protection (DEP) issued a Final Order to Kincaid on April 24, 2003, requiring specific corrective actions to redress the alleged violations of DEP rules and statutes, including bacterial and chemical analyses and physical improvements to the water plant. Kincaid was ordered to pay an \$8,000 fine to DEP in the Final Order. According to DEP staff, Kincaid failed to fully comply with the corrective actions described above or pay the fine. DEP is currently seeking enforcement of the Final Order.

On April 20, 2004, the utility requested Commission approval of a proposed payment plan for its outstanding RAFs and associated penalties and interest. This recommendation addresses that request. This recommendation also addresses whether Kincaid should be ordered to show cause, in writing, within 21 days, why it should not be fined for failure to file annual reports by the dates due as required by Rule 25-30.110(3), Florida Administrative Code, and for failure to remit its regulatory assessment fees (RAFs) as required by Section 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code.

The Commission has jurisdiction pursuant to Section 367.145, Florida Statutes, and Section 367.161, Florida Statutes.

Discussion of Issues

Issue 1: Should Kincaid be ordered to show cause, in writing, within 21 days, why it should not be fined for failure to remit its regulatory assessment fees (RAFs) as required by Section 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code?

Recommendation: No. A show cause proceeding should not be initiated. Staff recommends that Kincaid's proposed payment plan for past due regulatory assessment fees and associated penalties and interest be approved, as outlined in the staff analysis below. The first payment should be received by June 20, 2004, and all subsequent payments should be due on the twentieth day of each month. If Kincaid fails to make a monthly payment by the twentieth day of the month, staff will return to the Commission for further enforcement of the payment plan, such as placement of a lien on the utility's real and personal property. (RODAN, KAPROTH)

Staff Analysis: In establishing rates, the Commission includes in its determination of the revenue requirements the utility's obligation to pay regulatory assessment fees. According to Commission records, this utility has outstanding RAFs for the years 1995-2003. Pursuant to Section 350.113(3)(e) and 367.145, Florida Statutes, and Rule 25-30.120(1), Florida Administrative Code, each utility shall remit annually RAFs in the amount of 0.045 of its gross operating revenue. Pursuant to Rule 25-30.120(2), Florida Administrative Code, "[t]he obligation to remit the [RAFs] for any year shall apply to any utility which is subject to [the] Commission's jurisdiction on or before December 31 of that year or for any part of that year, whether or not the utility has actually applied for or been issued a certificate." Accordingly, Kincaid is responsible for RAFs for the time period of 1995-2003. In failing to remit the RAFs for these years, Kincaid is in apparent violation of the above-referenced statutory and rule provisions.

Furthermore, 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.

Staff's calculation of the RAFs, plus penalties and interest owed by Kincaid for the periods indicated above is set out below. As of June 30, 2004, the amounts due would be as follows:

| Year | Revenues | Regulatory Assessment Fees | Penalty | Interest | Total |
|------|-------------|----------------------------|----------|------------------|--------------------|
| 1995 | \$42,308.00 | \$1,903.86 | \$475.97 | \$1,827.71 | \$4,207.53 |
| 1996 | \$42,705.00 | \$1,921.73 | \$480.43 | \$1,614.25 | \$4,016.41 |
| 1997 | \$41,886.00 | \$1,884.87 | \$471.22 | \$1,357.11 | \$3,713.19 |
| 1998 | \$41,745.00 | \$1,878.53 | \$469.63 | \$1,127.12 | \$3,475.27 |
| 1999 | \$42,310.00 | \$1,903.95 | \$475.99 | \$913.90 | \$3,293.83 |
| 2000 | \$40,185.00 | \$1,808.33 | \$452.99 | \$651.00 | \$2,911.40 |
| 2001 | \$42,220.00 | \$1,899.90 | \$474.98 | \$455.98 | \$2,830.85 |
| 2002 | \$41,400.00 | \$1,863.00 | \$465.75 | \$223.56 | \$2,552.31 |
| 2003 | \$42,008.00 | \$1,890.36 | \$283.55 | \$56.71 | \$2,230.62 |
| | | | | TOTAL DUE | \$29,231.42 |

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). Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, Florida Statutes. By failing to remit RAFs, the utility's acts were "willful" in the sense intended by Section 367.161, Florida Statutes. In Commission 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.

As stated above, on April 20, 2004, Kincaid submitted a letter requesting to pay its delinquent RAFs and associated penalties and interest by way of a payment plan. Staff is recommending approval of the proposed payment plan of \$3,000 up-front and subsequent monthly payments in the amount of \$500. If the Commission approves staff's recommended plan, Kincaid's payments for outstanding RAFs and associated penalties and interest will begin with the up-front payment of \$3,000 on June 20, 2004, and all subsequent monthly payments of \$500 should be due to the Commission on the 20th of each month. If the utility fails to make the required monthly installments by the due date of any month, staff will return to the Commission

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for further enforcement of the payment plan, such as placement of a lien on the utility's real and personal property.

Accordingly, staff recommends that show cause proceedings not be initiated against Kincaid for its apparent violation of the aforementioned statutes and Commission rules.

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Issue 2: Should Kincaid be ordered to show cause, in writing, within 21 days, why it should not be fined for failure to file annual reports by the dates due as required by Rule 25-30.110, Florida Administrative Code?

Recommendation: No. A show cause proceeding should not be initiated. Staff recommends that the penalties calculated according to Rule 25-30.110(7), Florida Administrative Code, for delinquent annual reports should not be assessed. (RODAN, KAPROTH)

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. According to Commission records, this utility failed to file its 1998-2003 annual reports in a timely manner. 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 reports were due through this June 1, 2004 Agenda Conference, the total penalty for the late-filed 1998-2003 annual reports is set out below.

| Year | Calculation | Amount |
|------|------------------|-------------------|
| 1998 | 1,267 x \$3/day | \$3,801.00 |
| 1999 | 901 x \$3/day | \$2,703.00 |
| 2000 | 536 x \$3/day | \$1,608.00 |
| 2001 | 171 x \$3/day | \$513.00 |
| 2002 | 225 x \$3/day | \$675.00 |
| 2003 | 11 x \$3/day | \$33.00 |
| | TOTAL DUE | \$9,879.00 |

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.

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). Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, Florida Statutes. By failing to

file its 1998-2003 annual reports in a timely manner, the utility's acts were "willful" in the sense intended by Section 367.161, Florida Statutes. In Commission 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 circumstances in this case are such that show cause proceedings should not be initiated. The utility's annual reports for the years 1998-2003 have now all been filed. The utility has been cooperative with staff during the past several months and is making a good faith effort towards bringing itself into regulatory compliance.

Accordingly, staff recommends that show cause proceedings not be initiated against Kincaid for its apparent violation of the aforementioned statutes and Commission rules. Staff also recommends that the Commission exercise its discretion as stated in Rule 25-30.110(6)(c), Florida Administrative Code, and not assess the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, for delinquent annual reports, for the reasons stated above.

Issue 3: Should this docket be closed?

Recommendation: Yes. This docket should be closed. If Kincaid does not make a payment in accordance with the payment schedule addressed in Issue 1, staff will return to the Commission for further enforcement of the payment plan. (RODAN)

Staff Analysis: This docket should be closed. If Kincaid does not make a payment in accordance with the payment schedule addressed in Issue 1, staff will return to the Commission for further enforcement of the payment plan.