

State of Florida



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-

DATE: March 4, 2010

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Walden, Marsh)
Office of the General Counsel (Brubaker)

Handwritten signatures and initials in blue ink, including 'JSB' and 'CRUB'.

RE: Docket No. 971622-SU – Initiation of show cause proceedings against Landmark Enterprises, Inc. in Highlands County for violation of Rule 25-30.110(3), F.A.C., Records and Reports; Annual Reports, and Rule 25-30.120, F.A.C., Regulatory Assessment Fees.

Docket No. 080236-SU – Notice of abandonment of wastewater system in Highlands County by Landmark Utilities, Inc.

Docket No. 090471-SU – Application for transfer of wastewater facilities to City of Sebring by Landmark Utilities, Inc.
County(ies): Highlands

AGENDA: 03/16/10 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: Edgar, Klement, Stevens (971622-SU)
All Commissioners (080236-SU)
All Commissioners (090471-SU)

PREHEARING OFFICER: Klement

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\971622.RCM.DOC

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Case Background

Landmark Utilities, Inc., formerly known as Landmark Enterprises, Inc. (Landmark or Utility), is a Class C utility located in Highlands County which provides wastewater service to approximately 243 residential customers and nine general service customers. Water service to these customers is provided by the City of Sebring (Sebring or City).

The wastewater system was granted Certificate No. 487-S by this Commission on October 4, 1993.¹ There have been continuing violations cited by the Department of Environmental Protection (DEP) due to the treatment plant's dilapidated condition. The Utility is delinquent in regulatory assessment fees (RAFs) and filing annual reports

On April 23, 2008, Landmark gave notice to Highlands County that the Utility was being abandoned effective sixty days from the date of the notice, pursuant to Section 367.165, F. S. The notice was received by the Commission on April 25, 2008.

Highlands County petitioned the Tenth Judicial Circuit Court in Highlands County to appoint a receiver to operate the system, suggesting that the DEP should be appointed as receiver. The court hearing was conducted on May 29, 2008, and the DEP was so appointed. Subsequently on June 29, 2009, the City was appointed receiver. The City and the Utility have signed an agreement for sale and purchase, and while the closing is imminent, it has not yet occurred.

The purpose of this recommendation is for the Commission to acknowledge the notice of abandonment, acknowledge the appointment of a receiver, recognize the sale to the City, and cancel the Utility's certificate. Pursuant to Section 367.022(2), F.S., utility systems owned, operated, managed, or controlled by governmental authorities are exempt from Commission regulation. The Commission has jurisdiction pursuant to Sections 367.165 and 367.071, F.S.

¹ Order No. PSC-93-1431-FOF-SU, issued October 4, 1993, in Docket No. 920923-SU, In re: Application for wastewater certificate in Highlands County by Landmark Enterprises, Inc.

Discussion of Issues

Issue 1: Should the Commission acknowledge the appointment of the City of Sebring as receiver for the Utility, recognize the sale of the Utility to the City, and cancel Certificate No. 487-S?

Recommendation: Yes. The Commission should acknowledge the appointment of the City of Sebring as receiver for the Utility, recognize the sale of the Utility to the City, and cancel Certificate No. 487-S effective June 29, 2009. (Walden, Brubaker)

Staff Analysis: Section 367.165, F.S., requires a utility to give sixty days' notice to the County where the utility is located and to also give that same notice to the Commission prior to the abandonment of a utility. By letter dated April 23, 2008, Landmark gave notice of its intent to abandon its wastewater plant and system.

The wastewater system is located in Highlands County, west of Sebring and serves a mobile home park called Thunderbird Hills Mobile Home Park. The plant and system are in need of repair and the Utility has been cited by the DEP for deficiencies.

As a result of the abandonment notice, DEP was appointed as receiver by order dated May 29, 2008, in the Tenth Judicial Circuit Court in Highlands County in Case No. GC-02-560. The responsibility of the receiver is to operate the utility as efficiently and effectively as possible until there is final disposition of the property. When DEP did not assume the receivership; instead, the Utility's owner, Mr. Plank, agreed to continue to operate the plant until another receiver could be found. Subsequently on June 29, 2009, the City was appointed receiver. The Court's order required Landmark to relinquish all records to the receiver. The Utility did not collect deposits from its customers and therefore no deposits were transferred. Based upon the Utility's notice and appointment of a receiver, staff recommends that the Commission acknowledge the Utility's notice of abandonment pursuant to Section 367.165, F.S.

After the appointment of DEP as receiver, the City entered into a contract on October 7, 2008, for purchase of the wastewater plant and system and 23 undeveloped lots from the Utility owner, David S. Plank. The purchase price for the wastewater plant, collection system, and lots is \$100,000. The lots are owned by Mr. Plank individually and are not part of the Utility's assets. The purchaser had 45 days to inspect the facilities and provide written notice to the seller giving notice of the purchaser's intent to back out of the contract. That time period expired November 21, 2008.

Sebring has been constructing an interconnect of this wastewater system to the City's existing system with the intention of taking the Landmark plant off line. That interconnect was to be completed by February 15, 2010. The City expects that closing on the system should be accomplished not later than May 14, 2010.

Pursuant to Section 367.022(2), F.S., utility systems owned, operated, managed, or controlled by governmental authorities are exempt from Commission regulation. With the appointment of this receiver and the contract to purchase the system by the City, staff recommends that the Utility's certificate be cancelled effective June 29, 2009.

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Rule 25-30.060(3), F.A.C., requires that within ten days of the appointment of the receiver by the circuit court, the receiver shall request from the Commission a copy of the utility's tariff and most recent annual report. These materials were copied and provided to the City.

Staff recommends that the Commission acknowledge the appointment of the City of Sebring as receiver for the Utility, recognize the sale of the Utility to the City, and cancel Certificate No. 487-S effective June 29, 2009.

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Issue 2: Should the Commission proceed to request approval to write off the uncollected regulatory assessment fees, fines, and penalties, as well as penalties for annual reports that have not been submitted?

Recommendation: Yes. The Commission should proceed to obtain approval from the Florida Department of Financial Responsibility to write off the uncollected regulatory assessment fees, fines, and penalties, as well as penalties for annual reports that have not been submitted. (Marsh, Brubaker)

Staff Analysis: Landmark has failed to file its annual reports for the years 1994 through 2008, except for 2001. The Utility has failed to pay RAFs for the years 1994 through 2008, except for partial payments in 2002 and 2003. Estimates for calculating fees are based on the Utility's 2001 annual report. Rule 25-30.110, Florida Administrative Code (F.A.C.), requires utilities subject to the Commission's jurisdiction as of December 31 to file an annual report each year on or before March 31 of the following year. Pursuant to Rule 25-20.110(6)(c), F.A.C., any utility that fails to file a timely, complete annual report is subject to penalties, absent demonstration of a good cause for non-compliance.

By Order No. PSC-98-0269-FOF-SU, issued February 10, 1998, the Commission ordered the Utility to show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$10,116 for violation of Rule 25-30.110, F.A.C., for failing to file its annual reports from 1993 to 1996. The Commission ordered Landmark to immediately file annual reports from 1993 to 1996, and put the Utility on notice that further violations of Rule 25-30.110, F.A.C., would result in further action by the Commission. Landmark was ordered to show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$385.52 and interest in the amount of \$358.36 for violations of Rule 25-30.120(5)(b), F.A.C. The Utility was also ordered to immediately remit \$3,086.38 in delinquent RAFs for 1994 and 1995. Order No. 98-0269-FOF-SU also provided that if reasonable collection efforts were unsuccessful, the collection of penalties and interest would be forwarded to the Comptroller's office and the docket closed.

It should be noted that cancellation of the Utility's certificate as discussed in Issue 1 does not relieve the Utility's obligation regarding the outstanding regulatory assessment fees and annual reports. The outstanding fees, penalties, and interest calculated through March 16, 2010, total \$45,468 for RAFs and \$132,780 for annual reports. Outstanding fees, penalties, and interest continued to accumulate until the governmental authority took control of the Utility. No annual report for 2009 needs to be filed due to the City's control of the system since that date.

Failure to pay regulatory assessment fees

On September 3, 2002, Landmark filed its RAF returns for 1998, 1999, 2000, and 2001. The Company made a series of payments from September 3, 2002 through February 12, 2003, totaling \$4,841.54. No further payments have been made. Through the date of the Agenda, March 16, 2010, the Utility owed an estimated total of \$23,395 in RAFs, plus \$6,543 in penalties and \$15,529 in interest, for a total of \$45,468.

RAFs are intended to cover the costs incurred in the Commission's regulation of utilities, and Section 367.145, F.S., requires water and wastewater utilities to remit RAFs to this Commission. Pursuant to Section 350.113(4), F.S., and Rule 25-30.120(7)(a), F.A.C., a statutory penalty plus interest shall be assessed against any utility that fails to timely pay its RAFs, in the following manner:

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

Payment of RAFs, plus associated penalties and interest, is required by Sections 367.145(1), and 350.113(3) and (4), F.S. Therefore, the Commission does not have the power to waive the requirement for payment of RAFs, associated penalties, and interest. Pursuant to Sections 367.145(1)(b) and 367.161, F.S., and Rule 25-30.120(7)(b), F.A.C., the Commission may impose an additional penalty upon a utility for failure to pay RAFs in a timely manner.

Failure to submit annual reports

Pursuant to Rule 25-30.110, F.A.C., the filing of annual reports with the Commission is required. Any utility which fails to file an annual report within the specified timeframe, pursuant to Rule 25-30.110(7), F.A.C., shall be subject to a penalty of \$3.00 per day for Class C utilities. Landmark failed to file its required annual reports from 1993 through 2008, with the exception of 2001, which was filed on September 3, 2002. The penalties owed for failure to file the annual reports total \$132,780 through March 16, 2010.

The Utility does not have sufficient resources to continue to operate the system, which is the reason for abandonment, nor has the Utility had the financial resources to maintain the treatment plant and accomplish needed improvements. It is staff's understanding that the only assets owned by the Utility and its owner are the Utility, the plant site, and the lots under contract for sale to the City, which makes it unlikely that funds are available to pay the fines, penalties, and interest that have accumulated. Staff therefore recommends that steps be taken to obtain approval from the Florida Department of Financial Responsibility to write off these amounts as uncollectible.

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Issue 3: Should this docket be closed?

Recommendation: Yes. If the Commission approves Staff's recommendations in Issues 1 and 2, upon referral of the unpaid regulatory assessment fees, penalties, and interest to the Department of Financial Services regarding authority to write off the account as uncollectible, these dockets should be closed administratively. (Brubaker)

Staff Analysis: If the Commission approves Staff's recommendations in Issues 1 and 2, upon referral of the unpaid regulatory assessment fees, penalties, and interest to the Department of Financial Services regarding authority to write off the account as uncollectible, these dockets should be closed administratively.