

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for exemption from )	DOCKET NO. 910655-WU
Florida Public Service Commission )	ORDER NO. 24936
regulation for provision of water )	ISSUED: 8/20/91
service in Broward County by )	
H2Oulton Metering Systems, Inc. )	
_____ )	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman  
 J. TERRY DEASON  
 BETTY EASLEY  
 MICHAEL MCK. WILSON

NOTICE OF PROPOSED AGENCY ACTIONORDER DENYING REQUEST FOR EXEMPTION

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose substantial interests are affected files a petition for a formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code.

By letter and affidavit filed on January 22, 1991, H2Oulton Metering Systems, Inc. (H2Oulton) requested a statewide exemption pursuant to Section 367.022(8), Florida Statutes. Section 367.022(8), Florida Statutes, states that any person who resells water and wastewater service at a rate or charge which does not exceed the actual purchase price thereof and who complies with certain reporting requirements is exempt from Commission regulation. According to the affidavit, H2Oulton will install and maintain meters to resell utility service within apartment buildings, mobile home parks, condominiums and retail complexes.

According to its request for exemption, H2Oulton proposed to operate a network of franchised or company owned service centers throughout the state. These service centers would contract with landlords for the sub-metering program. H2Oulton would individually meter each unit and would retain ownership and the responsibility for any maintenance of the meters. H2Oulton would

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read the meters, collect deposits, bill the tenants/customers, receive payments, terminate service for nonpayment, and maintain all records. By providing these services, H2Oulton believes that it is a utility, and thereby, entitled to a resale exemption by the Commission.

Moreover, the sub-metering service would be provided at no "up-front" cost to the landlord. The landlord would be solely responsible for the payment of water and wastewater bills based upon the master meter usage. The individual tenants would pay H2Oulton for their utility service at a rate not exceeding the purchase price of the service being resold through the master meter. Each month H2Oulton would remit a portion of the revenue collected to the landlord. Initially, 25 percent of the revenue would go to the landlord until the cost of the meters were recouped. Upon recovery of these costs, the landlord would receive 70 percent of the revenue collected by H2Oulton. H2Oulton also proposed to file annual reports for each property pursuant to Section 367.022(8), Florida Statutes, and Rule 25-30.111, Florida Administrative Code.

Sub-metering is generally done by the landlord, although a billing service may be employed. We believe that if any exemptions are granted, they should be granted in the name of the landlord as opposed to H2Oulton. The landlord is the customer of record of the water and wastewater utility for bills rendered based upon the master meter. Therefore, the entire reselling concept is dependent upon the landlord's payment of this bill over which H2Oulton would have no control. Having the exemption in the landlord's name would make the landlord responsible for the provision of the utility service. Furthermore, granting an exemption in the instant case would serve to approve the circumvention or contravention of Section 83.67(1), Florida Statutes (Landlord Tenant Act). Section 83.67(1), Florida Statutes, requires that "no landlord of any dwelling unit . . . shall cause directly or indirectly the termination or interruption of any utility service furnished to the tenant . . ." Also, looking at this case from a purely Chapter 367, Florida Statutes, perspective, exemptions granted to the landlord are not assignable to persons or entities that the landlord might subsequently contract with.

The Commission believes that H2Oulton is in the position of an agent of the landlord. According to Black's Law Dictionary (1979), an agent is "one who acts for or in place of another by

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authority from him; a substitute . . . appointed by the principal with power to do the things which the principal may do." Under this definition, H2Oulton, as agent of the landlord, must also be subject to Section 83.67(1), Florida Statutes. This means that H2Oulton, as well as the landlord, would be prohibited from terminating tenants' utility services for nonpayment. Further, the court in Boatright v. City of Jacksonville, 334 So.2d 339, 344 (Fla. 1st DCA, 1976) held that "a principal cannot delegate to an agent authority to do for him what he cannot do for himself. An act, which if done by the principal would be illegal because of violation of a statute, cannot be done for him by an agent."

However, in an effort to escape the agency relationship with the landlord, H2Oulton subsequently revised its contract to state that it was now an independent contractor. Such an assertion would still appear to contravene Section 83.67(1), Florida Statutes, because the statute prohibits any indirect termination or interruption of utility service to the tenant.

H2Oulton maintains that it should be granted an exemption because its sub-metering program is an effective way of achieving water conservation and cost control. It is well established that the Commission favors conservation in water usage. This issue of whether H2Oulton qualifies for an exemption or is a utility has nothing to do with the issue of conservation.

In addition, we do not believe that H2Oulton is a utility. H2Oulton's service consists of providing the meters and then being a billing and collection agency; H2Oulton does not provide water or the transmission of water; H2Oulton does not provide any kind of services having to do with water other than the installation of meters; and H2Oulton is not in a position to be responsible for the standards that utilities are held to relating to such issues as chlorination and water pressure. As a result, we conclude that H2Oulton is not a utility and should not hold itself out as being a utility. We do not have the authority to create a whole new entity that exists to intervene in the landlord-tenant relationship which would be the effect if H2Oulton was granted its request for a reseller exemption.

Therefore, since H2Oulton fails to meet our definition of a utility and would collect utility deposits and terminate service in contravention of Section 83.67(1), Florida Statutes, we find it appropriate to deny the exemption request. Therefore, H2Oulton

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must cease holding itself out as a utility by discontinuing any collection of utility deposits and disconnection of service to tenants. H2Oulton must modify its contract and any advertising or promotional materials by removing any reference to the aforementioned claims. Also, within thirty (30) days of the date of this order, H2Oulton is to provide the Commission with a list of all properties to which it provides its services within counties under our jurisdiction.

It is, therefore,

ORDERED by Florida Public Service Commission that the request by H2Oulton Metering Systems, Inc., for exemption from regulation by the Florida Public Service Commission under Section 367.022(8), Florida Statutes, is hereby denied. It is further

ORDERED that H2Oulton Metering Systems, Inc. shall cease holding itself out as a utility, and discontinue any collection of utility deposits and disconnection of water service. Also, H2Oulton Metering Systems, Inc. shall modify its contract and any advertising or promotional materials to exclude these claims. It is further

ORDERED that H2Oulton Metering Systems, Inc. shall provide, within thirty (30) days from the date of issuance of this Order, a list of all properties to which it provides its services within counties under our jurisdiction. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final unless an appropriate petition in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the date set forth in the Notice of Further Proceedings below. It is further

ORDERED this docket shall remain open until the appropriate protest period has expired and H2Oulton Metering Systems, Inc. has filed with the Florida Public Service Commission a list of all properties to which it provides its services within counties under our jurisdiction.

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By ORDER of the Florida Public Service Commission, this  
20th day of AUGUST, 1991.

  
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STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on 9/10/91.

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In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

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

If this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.