

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against A.P. Utilities, Inc. for violation of Rule 25-30.110, F.A.C., Annual Reports, and Rule 25-30.120, F.A.C., Regulatory Assessment Fees.

DOCKET NO. 980729-WU

In re: Investigation of water rates of A.P. Utilities, Inc. in Marion County for possible overearnings.

DOCKET NO. 971504-WU
ORDER NO. PSC-98-1005-SC-WU
ISSUED: July 24, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER TO SHOW CAUSE,
REQUIRING PAYMENT OF DELINQUENT 1997 REGULATORY ASSESSMENT FEES,
COMPLIANCE WITH ORDER NO. PSC-98-0044-PCO-WU, AND
COMPLIANCE OF BOOKS AND RECORDS WITH
1994 NARUC UNIFORM SYSTEM OF ACCOUNTS

BY THE COMMISSION:

BACKGROUND

A.P. Utilities, Inc. (APU or utility) is a Class B water utility operating in Marion County. APU provides water service to approximately 1,200 customers in twelve subdivisions. In its 1996 annual report, the utility reported water operating revenues of \$244,277 and operating expenses of \$176,413, resulting in net operating income of \$67,864.

By Order No. 21762, issued August 21, 1989 in Docket No. 881603-WU, we granted a transfer of Certificate No. 380-W from

DOCUMENT NUMBER-DATE

07823 JUL 24 88

FPSC-RECORDS/REPORTING

North Central Florida Utilities, Inc. to APU. On November 30, 1990, Philip Woods purchased APU from Michael Blake, and by Order No. 24977, issued August 26, 1991 in Docket No. 910117-WU, we approved the transfer of majority control. The purchase also included the Aqua Pure Water Company (Aqua Pure) and Marico Properties, Inc. (Marico). By Order No. 25063, issued September 13, 1991 in Docket No. 910119-WU, we approved the transfer of assets from Marico to APU, and by Order No. 25075, issued September 17, 1991 in Docket No. 910118-WU, we approved the transfer of assets from Aqua Pure to APU.

Since the transfer of ownership of APU to Philip Woods, the utility has failed to correct deficiencies in its 1993 annual report, failed to file its 1994, 1995 and 1996 annual reports, and failed to pay its regulatory assessment fees for each of the years 1991 through 1996. By Order No. PSC-97-0286-FOF-WU, issued in Docket No. 961141-WU on March 13, 1997, we ordered the utility to show cause, in writing, within 20 days why it should not remit a penalty for failure to file its 1994 and 1995 annual reports, failure to pay its regulatory assessment fees for each of the years 1991 through 1995, and failure to correct deficiencies in its 1993 annual report. The utility failed to respond to our order, and by that order the utility's failure to respond was deemed an admission of the facts. The delinquent regulatory assessment fees, associated penalties and interest, and penalties associated with delinquent annual reports totaling \$94,326.75, have been referred to the Department of Banking and Finance's Office of the Comptroller for collection (regulatory assessment fees: \$44,159.36; penalty: \$11,039.83; interest: \$14,895.06; and penalty for delinquent annual reports: \$24,232.50).

By Order No. PSC-97-1556-PCO-WU, issued in Docket No. 971076-WU, on December 11, 1997, we ordered APU to show cause, in writing, within 20 days of the order, why it should not remit a penalty for failing to timely file its annual report and failing to remit its regulatory assessment fees for 1996. The order also directed the utility to immediately remit regulatory assessment fees for 1996. The utility failed to respond to our order, and by that order the utility's failure to respond was deemed an admission of the facts. The delinquent regulatory assessment fees, associated penalties and interest, and penalties associated with the untimely filed annual report totaling \$17,501.26, were referred to the Comptroller's Office on March 5, 1998 for further collection efforts (regulatory assessment fees: \$10,992.47; penalty: \$2,748.12, interest:

1,209.17; and penalty for untimely filed 1996 annual report \$2,551.50).

Further, although the utility untimely filed its 1996 annual report on October 6, 1997, the annual report contained deficiencies. By letter dated October 16, 1997, the utility was notified of the deficiencies. The utility was given until November 10, 1997, to correct them. The utility never responded.

The utility also owes \$10,992.47 in regulatory assessment fees for 1997. By letter dated December 9, 1997, the utility was notified that the regulatory assessment fees were due on March 31, 1998. The utility neither filed for an extension nor remitted the fees.

In addition to the utility's failure to file annual reports and pay regulatory assessment fees, it also appears that the utility is overearning. By Order No. PSC-98-0044-PCO-WU, issued January 6, 1998, in Docket No. 971504-WU, we initiated an investigation into APU's rates and charges for potential overearnings. By that order, we required APU to perform the following: (1) place its revenues subject to refund pending our investigation of the utility's possible overearnings; (2) provide security in the form of a bond, letter of credit or escrow agreement to guarantee any potential refund of its revenues; and (3) escrow 4.5% of its revenues to ensure payment of APU's 1998 regulatory assessment fees. APU has failed to comply with our order. Furthermore, our audit in the investigation of the utility's potential overearnings indicates that APU has failed to maintain its books and records in compliance with the 1994 National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts (USOA), as required by Rule 25-30.115, Florida Administrative Code.

1996 DEFICIENT ANNUAL REPORT

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. Requests for extension of time must be in writing and must be filed before March 31. One extension of 30 days is automatically granted. A further extension may be granted upon showing of good cause. Pursuant to Rule 25-30.110(8)(a), Florida Administrative Code, the Commission's Division of Water and Wastewater shall provide written notification to a utility if the

annual report is incomplete. The utility shall provide the missing information no later than 30 days after the date on the notification. After 30 days, the annual report is considered delinquent.

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 B utilities is \$13.50 per day. The penalty is calculated based on the number of days elapsed since March 31, or the approved extension date, and the actual date of filing.

The utility's 1996 annual report was due on March 31, 1997. The utility filed the annual report on October 6, 1997. On December 11, 1997, we issued Order No. PSC-97-1556-PCO-WU, in which we ordered APU to show cause, in writing within 20 days of the order, why it should not remit a penalty of \$2,551.50 for failing to timely file its 1996 annual report. As stated in the background, pursuant to the order, we made reasonable collection efforts, consisting of two certified letters requesting payment, dated January 26, 1998, and February 9, 1998. Those efforts were unsuccessful. Collection was transferred to the Department of Banking and Finance, Comptroller's Office on March 5, 1998 for further collection efforts. Although the utility filed its 1996 annual report, it failed to provide missing information as requested in our staff's letter dated October 16, 1997. The utility's failure to correct those deficiencies constitutes a continuing violation of Rule 25-30.110(8)(a), Florida Administrative Code.

Utilities are charged with the knowledge of our 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 utility's failure to correct deficiencies in its annual report, 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., this Commission, having found that the utility 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.

In consideration of the foregoing, APU is hereby ordered to show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$3,037.50 (225 days x \$13.50 per day) for violation of Rule 25-30.110, Florida Administrative Code, by failing to correct deficiencies in its 1996 annual report. APU is hereby put on notice that further violations of Rule 25-30.110, Florida Administrative Code, will result in further action by us.

1997 REGULATORY ASSESSMENT FEES

In establishing rates, we include in our determination of the revenue requirements the utility's obligation to pay regulatory assessment fees.

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 regulatory assessment fees, in the following manner:

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

In addition, pursuant to Sections 367.145(1)(b) and 367.161, Florida Statutes, and Rule 25-30.120(7)(b), Florida Administrative Code, we may impose an additional penalty upon a utility for failure to pay regulatory assessment fees in a timely manner.

A notice requiring payment of its regulatory assessment fees was mailed to the utility on December 9, 1997. To date, the utility has not remitted the fees. We calculated the penalty and interest based on the number of days elapsed since the respective regulatory assessment fees were due and the date of the agenda. The date of the agenda is included in computing the amount of time elapsed. We note that penalties and interest will continue to

accrue until the utility pays the delinquent regulatory assessment fees.

Since 1991, this utility has collected the regulatory assessment fees and not paid them as required by statute. Regulatory assessment fees are intended to cover the costs incurred in Public Service Commission regulation of utilities. Apparently, the utility has no inclination to pay the fees voluntarily, nor does it appear that the utility is making a good faith effort toward payment. As discussed herein, utilities are charged with the knowledge of our rules and statutes. Thus, the intentional act of failing to remit regulatory assessment fees would meet the standard for a "willful violation." Accordingly, APU is hereby ordered to show cause, in writing, within 20 days, why it should not remit a statutory penalty in the amount of \$2,198.49 and interest in the amount of \$439.70 for violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to remit 1997 regulatory assessment fees. Further, APU is ordered to immediately remit \$10,992.47 in outstanding regulatory assessment fees for 1997.

POTENTIAL OVEREARNINGS OF 1998 REGULATORY ASSESSMENT FEES

By Order No. PSC-98-0044-PCO-WU, issued January 6, 1998, we initiated an investigation into APU's rates and charges for potential overearnings. By that order, we required APU to perform the following: (1) place its revenues subject to refund pending our investigation of the utility's possible overearnings; (2) provide security in the form of a bond, letter of credit or escrow agreement to guarantee any potential refund of its revenues; and (3) escrow 4.5% of APU's revenues to ensure payment of APU's 1998 regulatory assessment fees.

Following issuance of our order, we discovered that the utility had failed to establish the required security for refunds and regulatory assessment fees. On January 28, 1998, our staff sent a letter, along with a copy of our order, to Mr. Philip Woods, the president of APU, reminding Mr. Woods of the utility's obligations under the order. After repeated telephone conversations between Mr. Woods and our legal staff, Mr. Woods mailed a letter, dated March 6, 1998, indicating that he had established interest bearing escrow accounts to provide the required security for overearnings and regulatory assessment fees. Mr. Woods included copies of the account applications, and stated that he had deposited \$2,944 into the overearnings account and

ORDER NO. PSC-98-1005-SC-WU
DOCKETS NOS. 980729-WU, 971504-WU
PAGE 7

\$654.59 into the regulatory assessment fees account. Order No. PSC-98-0044-PCO-WU requires that \$2,694 per month be deposited for security of potential overearnings.

Following the utility's March 6 letter, our staff verified that the accounts established by the utility were actually non-interest bearing checking accounts. Following repeated telephone conversations, an informal conference was held between the utility and our staff. At that time, it was explained that the utility would be facing show cause and potential revocation proceedings if it did not file its 1997 annual reports, pay its 1997 regulatory assessment fees, and establish interest bearing escrow accounts with deposits for revenues dating back to January of 1998 for regulatory assessment fees and December 16, 1997 - the date we voted to require security - for guarantee of refunds for potential overearnings.

At this meeting, the utility presented signed escrow agreements. These agreements were then provided to the Director, Division of Records and Reporting, for signature. Since that meeting, however, the utility has failed to provide all required deposits.

Section 367.161(1), Florida Statutes, authorizes us to assess a penalty of \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated, any lawful order of the Commission. As discussed herein, utilities are charged with the knowledge of our rules and statutes. Thus, the intentional act of failing to comply with Order No. PSC-98-0044-PCO-WU, would meet the standard for a "willful violation."

The utility had ample opportunity to provide the security required by our order. The utility has failed to escrow all required funds as required by our order. Accordingly, APU is hereby ordered to show cause, in writing within 20 days, why it should not be fined \$5,000 per day for violation of Order No. PSC-98-0044-PCO-WU.

BOOKS AND RECORDS

Rule 25-30.115, Florida Administrative Code, requires water and wastewater utilities to maintain their books and records in compliance with the 1994 NARUC USOA. On October 22, 1997, our Division of Auditing and Financial Analysis performed an audit of APU's books and records. In Audit Exception No. 1, our auditor

reported that the utility's books and records were not maintained in substantial compliance with NARUC Water, "Class B," Accounting Instructions 2A & B in that:

The utility generated a non-accrual computerized spreadsheet for expenses, however, did not maintain a formal general ledger for recording data.

In instances, there was an inadequate audit trail between the utility's records and source documentation.

Based on the auditor's findings, he recommended that the utility be directed to maintain its books and records in compliance with NARUC Water, "Class B," Accounting Instructions 2A & B.

APU's failure to maintain its books and records in compliance with the NARUC USOA could warrant a show cause proceeding at this time. However, because this is the first case in which APU's books and records were fully reviewed, it is reasonable to allow the utility the opportunity to bring its books and records into compliance before enforcement proceedings are initiated. A six-month period is reasonable for APU to bring its books and records into compliance. If, at the end of six months, APU fails to be in substantial compliance with the NARUC USOA, show cause proceedings shall be initiated immediately.

RESPONSE TO ORDER TO SHOW CAUSE AND CLOSING THE DOCKET

APU's response to the show cause order must contain specific allegations of fact and law. Should APU file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings will be scheduled before a final determination of this matter is made. If APU responds to the show cause order by remitting the penalty for failure to correct deficiencies in its 1996 annual report, and by remitting 1997 regulatory assessment fees and remitting all associated penalties and interest, Docket No. 980729-WU shall be closed administratively. If APU responds to the show cause order and requests a hearing, Docket No. 980729-WU shall remain open for final disposition.

Failure to Respond

A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and

a waiver of the right to a hearing. In the event that APU fails to file a timely response to the show cause order, the fine is deemed assessed with no further action required by us. In such case, pursuant to Section 367.161, Florida Statutes, the penalties and interest set forth in this Order shall be a lien on the real and personal property of the utility, enforceable by this Commission as a statutory lien under Chapter 85, Florida Statutes. The proceeds of such lien shall be deposited in the General Revenue Fund.

Further, pursuant to Section 55.10, Florida Statutes, this Order shall be recorded as a lien on the real and personal property of the utility and its directors for the amount of delinquent regulatory assessment fees, and shall be enforceable as a lien upon being duly recorded with the Clerk of the County Court in Marion County, Florida. The proceeds of such lien shall be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes, and Docket No. 980729-WU shall be closed administratively. Notice shall be provided to the utility and its directors of such lien, and shall be pursued as appropriate pursuant to Sections 55.10, and 69.041, Florida Statutes.

Disposition of Docket No. 971504-WU

Regardless of APU's response regarding this Order, Docket No. 971504-WU shall remain open for final disposition of the Commission's overearnings investigation and full payment of the utility's 1998 regulatory assessment fees.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that A.P. Utilities, Inc., 3925 South East 45 Court, Ocala, Florida 34480, show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$3,037.50 for violation of Rule 25-30.110(8)(a), Florida Administrative Code, by failing to correct deficiencies in its 1996 annual report. It is further

ORDERED that A.P. Utilities, Inc. show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$2,198.49 and interest in the amount of \$439.70 for violation of Rule 25-30.120(7)(b), Florida Administrative Code. It is further

ORDERED that A.P. Utilities, Inc. immediately remit \$10,992.47 in delinquent regulatory assessment fees for 1997. It is further

ORDER NO. PSC-98-1005-SC-WU
DOCKETS NOS. 980729-WU, 971504-WU
PAGE 10

ORDERED that A.P. Utilities, Inc. show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$5,000 per day for violation of Order No. PSC-98-0044-PCO-WU for failure to escrow all required funds as required by that order. It is further

ORDERED that A.P. Utilities, Inc. shall bring its books and records into compliance with the 1994 NARUC USOA in accordance with Rule 25-30.115, Florida Administrative Code, within six months of the date of this Order. It is further

ORDERED that any response to this Order to Show Cause must contain specific allegations of fact and law. It is further

ORDERED that any response to this Order to Show Cause be filed with the Director of the Division of Records and Reporting within 20 days of this Order. It is further

ORDERED that in the event that A.P. Utilities, Inc. files a written response which raises material questions of fact and requests a hearing pursuant to Section 120.57, Florida Statutes, further proceedings may be scheduled before final determination is made. It is further

ORDERED that if A.P. Utilities, Inc. fails to file a timely response to this Order to Show Cause, such failure shall constitute an admission of the facts alleged in the body of this Order and a waiver of any right to a hearing. It is further

ORDERED that if A.P. Utilities, Inc. fails to file a timely response to this Order to Show Cause, the penalties and interest set forth in this Order shall be a lien on the real and personal property of A.P. Utilities, Inc., and its directors, Philip and Joan Woods, 3225 S.E. 21st Avenue, Ocala, Florida 34481, and shall be enforceable by the Commission as a statutory lien under Chapter 85, Florida Statutes. It is further

ORDERED that any payment or collection of penalties shall be forwarded to the Department of Banking and Finance's Office of the Comptroller for deposit in the State General Revenue Fund.

ORDERED that if A.P. Utilities, Inc. fails to file a timely response to this Order to Show Cause, then pursuant to Section 55.10, Florida Statutes, this Order shall be recorded as a lien on the real and personal property of A.P. Utilities, Inc., and its

ORDER NO. PSC-98-1005-SC-WU
DOCKETS NOS. 980729-WU, 971504-WU
PAGE 11

directors, Philip and Joan Woods, for the amount of the utility's delinquent regulatory assessment fees, and shall be enforceable by the Commission as a lien upon being duly recorded with the Clerk of the County Court in Marion County, Florida. It is further

ORDERED that any payment or collection of 1997 regulatory assessment fees shall be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes. It is further


ORDERED that upon recording this Order as a lien, Docket No. 980729 shall be closed. It is further

ORDERED that if A.P. Utilities, Inc., responds to this Order to Show Cause by remitting the regulatory assessment fees, all penalties, and interest, Docket 980729-WU shall be closed administratively. It is further

ORDERED that regardless of A.P. Utilities, Inc.'s response regarding this Order, Docket 971504-WU shall remain open for final disposition of the Commission's overearnings investigation and full payment of the utility's 1998 regulatory assessment fees.

By ORDER of the Florida Public Service Commission this 24th day of July, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting



Kay Flynn, Chief
Bureau of Records

(S E A L)

CF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

This order is preliminary, procedural or intermediate in nature. 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 25-22.037(1), 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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 13, 1998.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing pursuant to Rule 25-22.037(3), Florida Administrative Code, and a default pursuant to Rule 25-22.037(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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.