

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for staff-
assisted rate case in Marion
County by East Marion Sanitary
Systems, Inc.

DOCKET NO. 010869-WS
ORDER NO. PSC-03-0328-FOF-WS
ISSUED: March 7, 2003

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING EXTENSION OF TIME TO COMPLETE FENCE REPLACEMENTS
AND ORDER HOLDING REVENUES SUBJECT TO REFUND

BY THE COMMISSION:

BACKGROUND

East Marion Sanitary Systems, Inc. (East Marion or utility) is an existing Class "C" utility which provided water and wastewater service to approximately 41 residential customers during the test year ending December 31, 2000. On June 19, 2001, East Marion filed an application for a staff assisted rate case and paid the appropriate filing fee on August 21, 2001. By Order No. PSC-02-1168-PAA-WS, issued August 26, 2002, we approved the utility's current rates, charges, and rate base. A portion of the rate base approved included an amount for pro forma fence replacements and other pro forma plant.

In the above-referenced order, we ordered the utility to complete the pro forma fence replacements within 90 days of the effective date of the order. The order became effective on September 18, 2002, with the issuance of Consumating Order No. PSC-02-1273-CO-WS. Therefore, the 90-day period ended December 18, 2002. The utility had made our staff aware that it

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was having problems completing the pro forma fence replacements by the due date and that it was attempting to find financing.

By letter received January 3, 2003, the utility requested an extension of time to complete the fence replacements which are the final items of pro forma plant required. The utility owner contacted our staff after having difficulty in securing funding for the fences. By letter received January 30, 2003, the utility withdrew its request for extension and stated that it could not obtain financing and that the fence replacements would not be completed. The utility also acknowledged that a rate reduction could follow. We have jurisdiction pursuant to Section 367.0814, Florida Statutes.

FENCE REPLACEMENTS

As discussed above, by Order No. PSC-02-1168-PAA-WS we ordered the utility to complete the pro forma fence replacements within 90 days of the effective date of the order. This 90-day period ended December 18, 2002. That order also specified that this docket would remain open pending our staff's verification that the utility had completed the pro forma replacement required.

Subsequent to the expiration of the 90-day period, the utility on January 3, 2003, requested an extension of time to complete the pro forma fence replacements. Although our staff filed a recommendation for the February 4, 2003, Agenda Conference, recommending that the utility be granted an extension, the utility subsequently withdrew the request for extension of time, and indicated that the fence replacements would not be accomplished due to the utility's inability to obtain financing. The utility initially acknowledged the potential for rate reduction for failure to complete the fence replacements. However, at the February 18, 2003, Agenda Conference, counsel for the utility argued that the utility should be allowed some level of expense for fence repair.

Upon consideration, we find that the utility shall comply with the requirement of Order No. PSC-02-1168-PAA-WS and complete the required fence replacements. That Order was finalized on September 18, 2002, and the utility's increase in rates pursuant to that Order has included the costs of the pro forma fence replacements. However, we shall give the utility an additional 90

days from our vote on February 18, 2003, to complete the fence replacement. Failure of the utility to complete the fence replacements within this 90-day period shall subject the utility to a show cause proceeding.

REVENUES HELD SUBJECT TO REFUND

As stated above, the rates approved by Order No. PSC-02-1168-PAA-WS included the costs of the fence replacements. However, no such fence replacements have taken place. The annual increase in revenue requirement included for the fence replacements is \$126 for water and \$1,248 for wastewater. We approved water and wastewater rates designed to recover \$21,906 and \$27,910, respectively. Applying the amounts for fence replacements of \$126 for water and \$1,248 for wastewater discussed above results in a 0.58% ($\$126 \div \$21,906$) and 4.47% ($\$1,249 \div \$27,910$) percentage of total revenues associated with the fence replacements (see Schedule A). The revenues associated with these costs for the fence replacements on a going forward basis from February 18, 2003, shall be held subject to refund with interest. No security shall be required for these amounts held subject to refund.

In no instance shall the maintenance and administrative costs associated with any refund be borne by the customers. These costs are the responsibility of, and shall be borne by, the utility. Should a refund be required, the refund shall be with interest and undertaken in accordance with Rule 25-30.360, Florida Administrative Code.

SHOW CAUSE PROCEEDING

Order No. PSC-02-1168-PAA-WS, issued August 26, 2002, required East Marion to complete the pro forma fence replacements within 90 days of the effective date of that Order. That Order was made effective by Order No. PSC-02-1273-CO-WS, issued September 18, 2002. Therefore, the utility should have completed the replacements prior to December 18, 2002.

However, the utility had problems with obtaining financing, and, initially, on January 3, 2003, filed its request for extension of time to complete the pro forma replacement. Moreover, several customers advised our staff that the pro forma fence replacements

had not been accomplished as required by Order No. PSC-02-1168-PAA-WS. The utility should have filed any request for extension prior to December 18, 2002, and so this request for extension was over two weeks late.

Our staff had initially filed a recommendation that the utility be granted an extension. However, prior to this recommendation being considered by this Commission, the utility withdrew its request, indicating that it would not complete the pro forma replacement, and acknowledging that rates could be reduced. Therefore, our staff withdrew its recommendation on granting an extension of time to complete the pro forma replacement, and filed another recommendation addressing the utility's indication that it would not complete the fence replacements as required by Order No. PSC-02-1168-PAA-WS.

Section 367.161, Florida Statutes, authorizes this Commission to assess a penalty of not more than \$5,000 per day 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. Utilities are charged with the knowledge of our orders, rules, and statutes. Additionally, "it 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 complete the pro forma fence replacements in a timely manner, would meet the standard for a "willful violation." In 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., Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, this 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.

Although regulated utilities are charged with knowledge of our orders, rules, and statutes, we do not believe that this approximate two week delay in seeking an extension of time to

complete the pro forma fence replacement rises to the level justifying the initiation of a show cause proceeding. Also, the revenues collected over the last couple of months for the fence replacement were less than annual repair expenditures the utility requested in the rate case for repairing the fence.

Based on the above, no show cause proceeding shall be initiated at this time. However, the utility shall be put on notice that a show cause proceeding shall be initiated if the utility fails to complete the fence replacements in the additional time allotted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that East Marion Sanitary Systems, Inc., shall complete the fence replacements required by Order No. PSC-02-1168-PAA-WS within 90 days from February 18, 2003. It is further

ORDERED that failure to complete the fence replacements within this expanded timeframe shall subject East Marion Sanitary Systems, Inc. to a show cause proceeding as set forth in the body of this Order. It is further

ORDERED that the increased revenues associated with the fence replacements as shown in the body of this Order shall be held subject to refund with interest on a going forward basis from February 18, 2003. It is further

ORDERED that should a refund be required, the refund shall be with interest and undertaken in accordance with Rule 25-30.360, Florida Administrative Code. It is further

ORDERED that this docket shall remain open pursuant to Order No. PSC-02-1168-PAA-WS. If the utility meets the land requirements pursuant to the above referenced order and completes the fence replacements as required, the docket shall be closed administratively upon our staff's verification that the fence replacements and land requirements have been met.

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By ORDER of the Florida Public Service Commission this 7th day
of March, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

RRJ

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15)

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days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services 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 after the issuance 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.

EAST MARION SANITARY SYSTEMS, INC.
TEST YEAR ENDING 12/31/02

SCHEDULE NO. A
DOCKET NO. 010869-WS

FENCE REPLACEMENT IMPACT ON WATER RATES

	<u>COMPLETED</u>	<u>NOT COMPLETED</u>	<u>DIFFERENCE</u>
Fence	2,138	1,738	
Accumulated Depreciation	986	(745)	
Averaging Adjustment	<u>(1,034)</u>	<u>31</u>	
Rate Base (Fence)	2,090	1,024	
Rate of Return	<u>10.00%</u>	<u>10.00%</u>	
Return on Fence	209	102	
Depreciation Expense	76	62	
Total	285	164	
true up (RAF)	<u>0.955</u>	<u>0.955</u>	
Impact	<u>\$298</u>	<u>\$172</u>	(\$126)

FENCE REPLACEMENT IMPACT ON WASTEATER RATES

	<u>COMPLETED</u>	<u>NOT COMPLETED</u>	<u>DIFFERENCE</u>
Fence	17,906	9,702	
Accumulated Depreciation	5,243	(4,308)	
Avg Adjustment	<u>(8,698)</u>	<u>179</u>	
Rate Base (Fence)	14,451	5,573	
Rate of Return	<u>10.00%</u>	<u>10.00%</u>	
Return on Fence	1,445	557	
Dep. Expense	<u>663</u>	<u>359</u>	
Total	2,108	916	
true up (RAF)	<u>0.955</u>	<u>0.955</u>	
Impact	<u>\$2,207</u>	<u>\$959</u>	(\$1,248)