

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building  
101 East Gaines Street  
Tallahassee, Florida 32399-0850

M E M O R A N D U M

August 5, 1993

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (SUMMERLIN) *[Signature]*  
DIVISION OF WATER AND WASTEWATER (SHAFFER) *[Signature]*

RE: UTILITY: SHADY OAKS MOBILE-MODULAR ESTATES, INC.  
DOCKET NO. 900025-WS  
COUNTY: PASCO

CASE: APPLICATION FOR STAFF-ASSISTED RATE CASE

AGENDA: AUGUST 17, 1993 - CONTROVERSIAL - PARTIES MAY NOT PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\900025.RCM

CASE BACKGROUND

Shady Oaks Mobile-Modular Estates, Inc., (Shady Oaks or utility) is a class "C" water and wastewater utility serving a 242 lot mobile-modular home park located in Pasco County, south of the City of Zephyrhills. On April 9, 1993, the Commission issued Order No. PSC-93-0542-FOF-WS fining Shady Oaks \$60,572 and ordering that a proceeding to revoke Shady Oaks' water and wastewater certificates be initiated. On April 26, 1993, Shady Oaks filed a Motion for Reconsideration of Order No. PSC-93-0542-FOF-WS. This recommendation addresses the utility's Motion for Reconsideration.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Shady Oaks Mobile-Modular Estates, Inc.'s Request for Oral Argument on its Motion for Reconsideration of Order No. PSC-93-0542-FOF-WS?

RECOMMENDATION: No.

DOCUMENT NUMBER-DATE

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FPC-RECORDS/REPORTING

MEMORANDUM-RECORDS AND REPORTING  
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**STAFF ANALYSIS:** Shady Oaks Mobile-Modular Estates, Inc.'s Motion for Reconsideration of Order No. PSC-93-0542-FOF-WS included a request for oral argument. Staff recommends that Shady Oaks' request be denied because Shady Oaks' Motion makes one basic argument at length and no purpose would be served by hearing oral argument reiterating that argument.

**ISSUE 2:** Should the Commission grant Shady Oaks Mobile-Modular Estates, Inc.'s Motion for Reconsideration of Order No. PSC-93-0542-FOF-WS?

**RECOMMENDATION:** No, the Commission should not grant Shady Oaks' Motion for Reconsideration. However, the Commission should suspend the \$60,572 fine if the utility submits a completed application for transfer or cancellation of its water and wastewater certificates within 120 days of the order disposing of the utility's Motion for Reconsideration.

**STAFF ANALYSIS:** Shady Oaks' Motion for Reconsideration of Order No. PSC-93-0542-FOF-WS (Attachment A hereto) makes one basic argument: the fine the Commission imposed was too high. In Order No. PSC-93-0542-FOF-WS, the Commission imposed a fine of \$60,572 which was an amount "equal to rate base." Shady Oaks concedes in its Motion for Reconsideration that a fine is appropriate (at page 3, paragraph 8). However, Shady Oaks believes that its conduct was not "egregious" enough to warrant the fine imposed. Specifically, the utility states:

3. The Commission's decision to fine this utility is an amount "equal to rate base" is grossly disproportionate to any egregious conduct on the part of the utility which was established by the facts in the hearing (which the utility didn't even attend), is contrary to the spirit of Chapter 367, Fla. Stat., and exceeds the Commission's authority. (emphasis added)

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Perhaps the most telling statement in Shady Oaks' Motion is the phrase underlined above. The utility did not attend the hearing in this matter--a hearing which the utility had requested. Shady Oaks goes on to state that a much smaller fine would be much more appropriate to achieve what it believes should be the purposes of a fine "given the resources of this utility and its owner. . . ."

Shady Oaks argues that the fact that this fine is clearly punitive somehow makes it inappropriate. The Commission's authority to penalize a utility emanates from Section 367.161, Florida Statutes, set forth below:

(1) If any utility, by any authorized officer, agent, or employee, knowingly refuses to comply with, or willfully violates, any provision of this chapter or any lawful rule or order of the commission, such utility shall incur a penalty for each such offense of not more than \$5,000, to be fixed, imposed, and collected by the commission. . . . Each day that such refusal or violation continues constitutes a separate offense. . . .

(2) The commission has the power to impose upon any entity that is subject to its jurisdiction under this chapter and that is found to have refused to comply with, or to have willfully violated, any lawful rule or order of the commission or any provision of this chapter a penalty of for each offense of not more than \$5,000, which penalty shall be fixed, imposed, and collected by the commission; or the commission may, for any such violation, amend, suspend, or revoke any certificate of authorization issued by it. Each day that such refusal or violation continues constitutes a separate offense. . . .

The Commission's authority to penalize a utility found to have willfully violated its orders could not be more expressly provided. This authority to penalize is intended to secure compliance with Commission statutes, rules and orders both by encouraging an individual utility to comply with Commission statutes, rules and orders and also by letting other utilities know that the Commission has the power to enforce these statutes, rules and orders. This decision regarding Shady Oaks lets them know that the Commission will exercise such power when it is necessary.

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This is a large fine in relation to the size of the utility. However, it is not a large fine in relation to the conduct of the utility. Staff recommends that the Commission deny Shady Oaks' Motion for Reconsideration of Order No. PSC-93-0542-FOF-WS as it has raised no error in fact or law which the Commission failed to consider in its decision.

The utility, subsequent to its submission of its Motion for Reconsideration, submitted a letter, dated June 18, 1993, (Attachment B hereto) which reflects that it will complete certain requirements that were the subject of the proceeding that resulted in Order No. PSC-93-0542-FOF-WS and which have been outstanding for a long time. However, the time frames included in the letter do not provide any real assurance that the utility intends to rectify these long-standing problems immediately. Therefore, staff recommends that the utility's additional letter proposing certain time frames for specific actions does not support the utility's Motion for Reconsideration.

However, staff recognizes that the fine is a large amount and that the ultimate goal of this proceeding was to assure that this utility would be operated appropriately. Also, the Commission decided that a revocation proceeding should be initiated. Therefore, staff believes that, if the utility were to be transferred to some other owner that would assure that it would be run appropriately, it would be reasonable to suspend the fine. Therefore, staff recommends that the Commission suspend the fine if the utility submits a completed application for transfer or cancellation of its water and wastewater certificates within 120 days of the order disposing of the utility's Motion for Reconsideration.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Application for staff-assisted )  
rate case in Pasco County by Shady ) DOCKET NO. 900025-WS  
Oaks Mobile-Modular Estates, Inc. ) ORDER NO. PSC-93-0542-FOF-WS  
ISSUED: 4/9/93

SHADY OAKS' MOTION FOR RECONSIDERATION

Shady Oaks Mobile-Modular Estates, Inc. ("Shady Oaks"), by and through undersigned counsel and pursuant to Rule 25-22.060, Fla. Admin. Code, and in support thereof would state and allege as follows:

1. This Commission issued its Final Order Fining Utility And Ordering That Revocation Proceedings Be Initiated on April 9, 1993.

2. That Order, Order No. PSC-93-0542-FOF-WS, states, inter alia, that the record in this case supports the Commission taking "punitive action" against the utility in the form of a fine in the amount of \$60,572.00. That Order indicates, at Page 8, that this conclusion was based on the Recommended Order's suggestion that "the utility should be fined in the amount of rate base" and that "total rate base, less the wastewater system pro forma allowances is \$60,572.00."

3. The Commission's decision to fine this utility in an amount "equal to rate base" is grossly disproportionate to any egregious conduct on the part of the utility which was established by the facts in the hearing (which the utility didn't even attend), is contrary to the spirit of Chapter 367, Fla. Stat., and exceeds the Commission's authority.

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4. The purpose of a Commission fine in circumstances such as these should be to force compliance with Commission orders and, secondarily, to send a clear signal to other regulated entities that non-compliance with Commission orders cannot and will not be tolerated. Punishment, whether in the form of incarceration or criminal fines, is not an appropriate purpose for Commission action. However, the Prehearing Officer's Proposed Recommended Order in this case actually states, at Issue 6 thereof, that the appropriate "punitive action" by the Commission is that the utility should be fined in the amount of rate base and "the utility's certificate should be revoked." The Commission did find, in its Final Order on this case, that "the second change (to the Recommended Order) that we believe is appropriate is that we not revoke the utility's certificate at this time . . ." Although the Commission properly decided that the utility's certificate could not be revoked in a proceeding on Proposed Agency Action to assess a fine (in which revocation was never at issue) the Commission did accept the amount of the "punitive" fine as recommended.

5. When read together, the Recommended Order's finding that the utility should be fined in an amount equal to rate base and that the utility's certificates should be unilaterally revoked smacks of a recommendation that this utility be, for all intents and purposes, seized without appropriate due process or compensation as required by the United States and Florida Constitutions. The fine, on its face, does not appear to be intended to insure that the utility comply with the Commission's Orders since, given

the resources of this utility and its owner, a much smaller fine would have accomplished the same purpose.

6. An order by this Commission, under any conceivable facts and circumstances, that all of Southern States' certificates be revoked and that Southern States be fined in an amount equal to its total and cumulative rate base, would seem ridiculous on its face. An analogous recommendation in the case of a small utility is no less a violation of the spirit and intent of Chapter 367 and exceeds the powers which the Legislature has granted to the Commission.

7. Most governmental entities including, for example, the Florida Department of Environmental Regulation and the United States Environmental Protection Agency, employ a matrix when determining the appropriate amount of a fine to assess in a given case. That matrix includes categories such as economic benefit realized by the party to be fined, the party's ability to pay, the prior compliance history of the party, etc. It is not apparent on the face of the Commission's Order that the Commission considered in any way, shape or form, the party's ability to pay in this case. When stripped to its essence, the Commission's Order is nothing more than a back-door attempt to destroy this utility.

8. The Commission's fine in this case, given all the facts and circumstances surrounding Shady Oaks' size, alleged actions, ability to pay, etc. would have been appropriate if the fine was only a fraction of the assessed amount. This utility is contemporaneously attempting to show the Commission that it can not even



afford to obey the Commission's escrow requirements, much less pay a fine "in the amount of rate base."

9. The utility respectfully requests an opportunity to present oral argument on its Motion to the Commission.

DATED this 26<sup>th</sup> day of April, 1993.



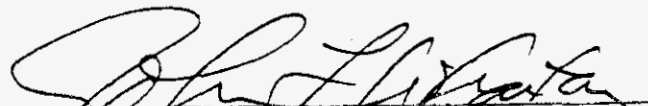
John L. Wharton, Esq.  
ROSE, SUNDSTROM & BENTLEY  
2548 Blairstone Pines Drive  
Tallahassee, FL 32301  
(904) 877-6555

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by regular U.S. Mail to the following on this 26<sup>th</sup> day of April, 1993.

Matthew J. Feil, Esq.  
Florida Public Service Commission  
101 E. Gaines Street  
Tallahassee, FL 32399-0863

Richard Bellak, Esq.  
Florida Public Service Commission  
101 E. Gaines Street  
Tallahassee, FL 32399-0862



John L. Wharton, Esq.

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August 5, 1993

ATTACHMENT B  
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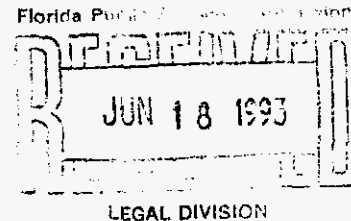
June 18, 1993

JOHN R. WODRASKA  
SPECIAL CONSULTANT  
(NOT A MEMBER OF THE FLORIDA BAR)

VIA HAND DELIVERY

Ms. Suzanne Summerlin  
Division of Legal Services  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, FL 32301

RE: Shady Oaks Utility  
Docket No. 900025-WS  
Our File No. 29056.01



Dear Suzanne:

Below please find, as we have discussed, a good faith timetable by which Shady Oaks' will comply with all outstanding requirements in the Commission's orders. As we know the staff appreciates, Shady Oaks badly needs to put its past problems behind it and to operate the utility in the best manner possible, to the benefit of both the utility and its customers, on a going-forward basis. Shady Oaks will cooperate with the Commission to the extent possible in this continuing endeavor. However, we believe that the Commission also appreciates that these types of improvements and/or subsequent actions can only occur in a timely manner if sufficient capital exists as required for their implementation. Shady Oaks has been working with the staff in an ongoing attempt to improve its revenue stream so that it will have sufficient capital, and/or the ability to attract sufficient capital and to support debt service on any borrowed funds, as necessary to undertake these projects.

Below are the specific expectations which we understand the Commission and the staff have for Shady Oaks and the dates by which Shady Oaks projects the same may be completed. We would appreciate your consideration that the utility is presently in dire financial straits.

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- |  | <u>DATE</u>                                   |
|--|---|
| • Interconnection to County. (This assumes rates and conditions obtained from the County for such interconnection which will not be to the detriment of either the utility or its customers.)  | within 8 months                               |
| • File a request for acknowledgement of a restructuring and name change.   | within 45 days                                |
| • Improve quality of service.  | continuing effort which has already commenced |
| • Expend 85% of the allowance for preventative maintenance on system's maintenance or provide written explanation for not doing so. (Shady Oaks is currently working with the staff in order to address the fact that the utility's net revenues, and particularly those during the summer months, are insufficient. Ms. Jenny Lingo's pending trip to the utility is in furtherance of this issue.) | as soon as possible                           |
| • Provide a detailed record of what monthly maintenance will be implemented.   | within 60 days                                |
| • Install meters for all of its customers.   | already accomplished                          |
| • Escrow a certain portion of the approved monthly rates to account for a fine and pro forma plan allowances. (The escrow requirement is the issue in a pending administrative proceeding in which the staff has acknowledged that the current escrow requirement may exceed Shady Oaks' ability to pay. A final determination on this issue has yet to be made but Shady Oaks                       | as soon as possible                           |

Ms. Suzanne Summerlin  
June 18, 1993  
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intends to cooperate with the decision  
of this Commission in this regard.)

- Past due regulatory assessment fees will calculate amount and pay in equal increments over 12 months
- 1992 annual report (currently being compiled) within 90 days

Should you have any questions or concerns regarding the above, please do not hesitate to contact me at your earliest convenience.

Sincerely,

ROSE, SUNDSTROM & BENTLEY



John L. Wharton, Esq.  
For The Firm

JLW/lm