State of Florida

ORIGINAL

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: JULY 23, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (JABER)
DIVISION OF WATER AND WASTEWATER (BETHEA, GALLOWAY, RIEGER)

RE: DOCKET NO. 900025-WS - APPLICATION FOR STAFF-ASSISTED RATE CASE IN PASCO COUNTY BY SHADY OAKS MOBILE-MODULAR ESTATES, INC.

DOCKET NO. 930944-WS - REVOCATION BY FLORIDA PUBLIC SERVICE COMMISSION OF CERTIFICATES NOS. 451-W AND 382-S ISSUED TO SHADY OAKS MOBILE-MODULAR ESTATES, INC. IN PASCO COUNTY, PURSUANT TO SECTION 367.111(1), F.S.
COUNTY: PASCO

AGENDA: AUGUST 4, 1998 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: ISSUE 1 PERTAINS TO DOCKET NO. 900025-WS; ISSUE NO. 2 PERTAINS TO DOCKET NO. 930944-WS; ISSUE NO. 3 PERTAINS TO BOTH.

FILE NAME AND LOCATION: S:\PSC\LEG\WP\900025.RCM

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CASE BACKGROUND

Shady Oaks Mobile-Modular Estates, Inc. (Shady Oaks or utility) is a Class C water and wastewater utility located in Pasco County. Pursuant to Order No. 15633, Certificates Nos. 451-W and 382-S were issued to Richard D. Sims on February 6, 1986. However, by Order No. PSC-94-0976-FOF-WS, issued August 11, 1994 in Docket No. 930944-WS, the Commission revoked Certificates Nos. 451-W and 382-S held by Richard D. Sims.

The Commission revoked Certificates Nos. 451-W and 382-S after finding that the utility: 1) lacked the technical ability to continue operating as a certificated utility; 2) had not complied with Sections 350.113 and 367.145, Florida Statutes and Rule 25-30.120, Florida Administrative Code (regulatory assessment fees); 3) misappropriated utility funds; 4) underfunded the escrow account established for improvements; and 5) demonstrated a willful and flagrant disregard of Chapter 367, Florida Statutes.

Immediately after the revocation hearing, Commission Staff met with Pasco County to inform County officials that the Commission revoked the utility's certificates and a receiver would need to be appointed by the Court pursuant to Section 367.165, Florida Statutes. Subsequently, Pasco County petitioned the Court and was appointed temporary receiver. Pasco County has operated the Shady Oaks facility from September 1, 1994 through May 26, 1998.

On February 16, 1998, Staff received a letter from counsel representing the Shady Oaks Owners Association, Inc. (Owners Association) stating that the Owners Association was appointed by the Court the successor receiver of the utility effective January 1, 1998. In its letter, the Owners Association also states that it is exempt pursuant to the provisions of Section 367.022(7), Florida Statutes as a nonprofit homeowners association.

In order to ease the transition to the new receiver the Court allowed the County to continue providing service and directly billing the customers of Shady Oaks until a wastewater master meter could be installed. The meter was installed on May 26, 1998, and the Owners Association began providing service on May 27, 1998, under a bulk wastewater agreement with the County.

Based on information contained in the utility's 1993 annual report, the water system generated operating revenues of $27,311 and incurred operating expenses of $37,310, resulting in a net operating loss of $9,999. The wastewater system generated operating revenues of $40,967 and incurred operating expenses of $42,651, resulting in a net operating loss of $1,684. By letter dated June 6, 1997, Pasco County reported total revenues (combined water and wastewater revenues) of $48,849.25 for 1995.

Dockets Nos. 900025-WS and 930944-WS have been left open to monitor the receivership situation, to address the final disposition of the escrow account and the payment of regulatory assessment fees. Since the utility has a successor receiver, Staff has prepared this recommendation to address all outstanding issues.

As point of information, customers of the utility are members of the Owners Association and therefore, pursuant to Section 367.022(7), Florida Statutes, the Owners Association is exempt from Commission regulation.

DISCUSSION OF ISSUES

ISSUE 1: Should the funds in the escrow account be released to the Shady Oaks Owners Association?

RECOMMENDATION: Yes, the Commission should release the funds in the escrow account to the Shady Oaks Owners Association. (GALLOWAY)

STAFF ANALYSIS: Pursuant to PAA Order No. 24084, issued in Docket No. 900025-WS, on February 8, 1991, Shady Oaks was granted a rate increase which included construction costs for pro forma plant, allowances for costs associated with the installation of meters, and allowances for costs associated with preventative maintenance. An escrow account was established by the utility pursuant to that order, to protect the customers in the event a protest was filed and the rate increase was modified. The utility failed to make the improvements and failed to escrow the appropriate amount as required by Order No. 24084.

On November 4, 1991, the Commission issued Order No. 25296 requiring the utility to, among other things, immediately place in the escrow account all funds necessary to bring said account to its proper balance and install water meters for all of its customers. While the utility did install meters, the utility never complied with the other requirements of that order. As a result of the utility's noncompliance, the Commission by Order No. PSC-93-1733-FOF-WS, issued December 1, 1993, reduced Shady Oaks' rates to reflect the removal of the proforma plant not constructed and preventative maintenance not spent and required a refund. The escrow account remained underfunded and refunds were never made.

On this same point, by Order No. PSC-94-0976-FOF-WS (the revocation order), the Commission stated:

> Since we have found it appropriate in a later portion of this Order to revoke Shady Oaks' certificates, the Commission will not authorize the release of the escrow monies until a receiver is appointed. At that time, the Commission will allow the escrow monies to be released to a duly appointed receiver so that the entire balance of

> all monies currently in the escrow account can be refunded to the customers in accordance with Order No. PSC-93-1733-FOF-WS. The total calculated underfunding of the escrow account, less the share of the escrow requirement relating to the water meters, shall be refunded to the utility's customers in the form of credits on the customers' bills. The refund shall be paid with interest, pursuant to Rule 25-30.360(4), Florida Administrative Code.

Once Pasco County was appointed temporary receiver, staff calculated each customer's pro rata refund, given the underfunding of the escrow account. The amount varied for each individual customer but totaled $9,608 in August 1994. The amount in escrow currently totals approximately $10,250. At that time, Staff believed that the customers were due a refund because the customers' rates included improvements that were never made. However, in telephone conversations and meetings with Pasco County during its receivership, Pasco County informally requested that the escrow monies be released to it, explaining that it would be making the necessary improvements and bearing the cost of interconnecting the utility's wastewater system with the County. The County also explained that its intent (at that time) was to eventually become permanent receiver. However, the Court subsequently found there to be a conflict of interest with the County providing service and ordered that the County be relieved as temporary receiver. The Owners Association was appointed receiver effective January 1, 1998, although the County continued providing service until May 26, 1998.

Staff has delayed disposing of the escrow funds in this case until the interconnect was completed and the receivership situation was resolved. We understood that the customers were satisfied with the County as receiver. We also understood that the County was spending County funds to make the improvements and interconnect with the utility. Staff's concern became, then, to whom should the underfunded escrow monies be released. While the customers were due a refund, the County making the improvements to the utility clouded the issue.

The County did in fact complete the wastewater interconnection and upgrades to the lift station. The Court ordered the former owners of the utility, Richard and Sue Sims, to reimburse the County for the costs of these improvements. The County subsequently collected the amount owed by garnishing a note on which the Sims were receiving payment. Therefore, none of the escrow funds should be considered owed to the County.

The Owners Association was responsible for installing the wastewater master meter in order to complete the transition of receivership. The Owners Association completed the installation of the master meter using its own funds at a cost of approximately $11,000. There is also a remaining debt of approximately $7,000 the utility owes the County for the meter itself. The County and Owners Association agreed that the payment for the meter will be made out of the proceeds of the sale of the utility.

The improvements for which the escrow account was established have now been completed. The Commission must now consider the appropriate disposition of the funds in escrow. Since the Owners Association has expended funds in excess of the amount in escrow on behalf of the utility and its customers, staff believes the escrow funds should be released to the Owners Association as receiver of the utility. Moreover, the utility had no liquid assets when it was transferred to the Owners Association. The Owners Association began operating the utility literally on a shoestring. In order to improve the financial viability of the utility and protect quality of service, Staff believes it more prudent to release the escrow account to the Owners Association so that there will be some excess funds for contingencies. The amount in escrow represents a modest reserve for this utility. Finally, refunds have become impractical and cumbersome given the time that has elapsed in this case. The Owners Association states that many of the customers who contributed to the escrow have moved or are now deceased. Nonetheless, a spokesperson for the Owners Association, Mr. Lindahl, has agreed to the Owners Association refunding any customers who may come forward to collect their refund.

Therefore, staff believes that given the very unique circumstances surrounding this particular utility, the escrow balance should be released to the Owners Association.

ISSUE 2: Should the Commission refer unpaid penalties and interest associated with Shady Oaks' 1994 through 1996 regulatory assessment fees to the Office of the Comptroller?

RECOMMENDATION: Yes. The Commission should refer $1,420 in unpaid penalties and interest to the Comptroller's Office for permission to write off the account. Accordingly, there is no need to rule on Pasco County's request, as receiver of Shady Oaks, for waiver of the penalty and interest.

STAFF ANALYSIS: On September 1, 1994, Pasco County was appointed temporary receiver of Shady Oaks Mobile-Modular Estates, Inc. by the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida. Pursuant to Section 367.022(2), Florida Statutes, Pasco County could have immediately sought an exemption for operating the Shady Oaks facilities. Staff did make the County aware of the exemption statute by letter and telephone conversations with various County staff. Staff also sent the County a copy of an application for an exemption. For whatever reason, Pasco County never filed an application for an exemption. Therefore, the utility, with Pasco County as receiver, was regulated by the Commission until June 1996, when Section 367.031, Florida Statutes, was amended to make exemptions self-executing.

Shady Oaks with Pasco County as receiver, did not remit regulatory assessment fees for the September 1994 to June 1996 time period in accordance with Section 367.145, Florida Statutes. After the nonpayment of regulatory assessment fees was brought to staff's attention, Staff contacted Pasco County about the outstanding regulatory assessment fees. After conversations with Pasco County and a meeting with County staff, Pasco County provided a statement of annualized utility revenues by year from September 1994 through June 1996 so that the appropriate amount of regulatory assessment fees could be determined. By letter dated June 6, 1997, Pasco County submitted a check in the amount of $3,926.57 for outstanding regulatory assessment fees and requested a waiver of the penalty and interest.[1]

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[1] Pasco County, on behalf of the utility, asserts that it has considered itself exempt since the beginning of its receivership and that it has not filed any annual reports, and has not paid any regulatory assessment fees as evidence of exemption. Further, Pasco County states that it became the receiver of this utility at the request of the Commission and that the Commission never gave the County notice that it had to apply for an exemption.

The Commission is required to set a regulatory assessment fee that each utility must pay once a year in conjunction with filing its annual financial report required by Commission rule. Section 367.145(1), Florida Statutes. Rule 25-30.120(1), Florida Administrative Code, requires each utility to pay a regulatory assessment fee based upon its gross operating revenue. Beginning January 1, 1991, each utility is required to pay a fee in the amount of four and one-half percent for the entire year. Pursuant to Section 350.113(4), Florida Statutes, and Rule 25-30.120(5)(a), Florida Administrative Code, a penalty shall be assessed against any utility that fails to pay its regulatory assessment fee by March 31, in the following manner:

> 1. An assessment of 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 the failure continues, not to exceed a total penalty of 25 percent.
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> 2. The amount of interest to be charged is 1% for each thirty days or fraction thereof, not to exceed a total of 12% per annum.

If the Commission were to consider the request for waiver of penalties and interest, the law as indicated above is clear that penalties and interest must be assessed to delinquent regulatory assessment fees. The law and prior Commission decisions are also clear that the Commission lacks the statutory authority to grant a waiver of the requirement to pay penalties and interest. See, Order No. PSC-96-0834-FOF-WS, issued July 1, 1996, in Docket No. 960540-WS, wherein the Commission construed the above provisions to bar waiver of regulatory assessment fees, penalties, and interest, but not to preclude a reasonable payment schedule to redress a utility's delinquency. See also, Order No. 24290, issued March 26, 1991 in Docket No. 900961-SU, wherein the Commission stated that it had no statutory authority to grant a waiver, and that Section 350.113(5), Florida Statutes, permitted a fee deadline to be extended 30 days for good cause shown. The Commission did, however permit the utility to submit a proposed payment schedule for its outstanding regulatory assessment fees, penalties, and interest. Also see, Order No. PSC-97-0767-FOF-FU, issued June 30, 1997 in Docket No. 970360-GU, June 30, 1997, wherein the Commission discussed its lack of authority to waive the statutory penalty and interest assessments on late regulatory assessment fee payments:

> It is the function of the legislature and not the courts or administrative agencies to change the law. 1 Fla. Jur. 2d, Administrative Law, Section 32. The grant of a waiver of the regulatory assessment fee penalty statute, in the absence of any waiver provisions, express or implied, contained in the statute, would be a modification of the statute. This is a function reserved solely for the legislature. In addition, there is no basis for interpretation of Section 350.113(4), F.S. The statute is clear and unambiguous on its face. If the terms and provisions of a statute are plain, there is no room for administrative interpretation. Southeastern Utilities Service Co. v. Redding, 131 So. 2d 1 (Fla. 1950).

Staff believes that a ruling on Pasco County's request is unnecessary. The utility itself is liable for the outstanding penalties and interest. The utility accumulated losses during the County's tenure and therefore lacked the funds to pay. Pasco County could not pay the penalties and interest out of the utility's funds and did not want to nor was required to use its own funds to pay the outstanding penalties and interest. The Owners Association now operates the utility, however there are no excess funds within the utility to pay the fines. A ruling on the request for waiver would ultimately only result in the initiation of a show cause proceeding for the $1,420 amount. Such action is not cost effective and collection of that amount is highly unrealistic. In consideration of the foregoing, Staff recommends that the Commission refer the unpaid penalties and interest to the Comptrollers Office for permission to write off the account.

This portion of the recommendation is consistent with Order No. PSC-98-0663-FOF-WS, issued May 14, 1998, in Docket No. 980342 and Order No. PSC-98-0906-FOF-SU, issued July 7, 1998 in Docket No. 980258-SU.

ISSUE 3: Should Dockets Nos. 900025-WS and 930944-WS be closed?

RECOMMENDATION: Upon release of the escrow monies to the Owner's Association and referral of the penalties and interest to the Comptroller's Office, Dockets Nos. 900025-WS and 930944-WS should be closed. (JABER)

STAFF ANALYSIS: Dockets Nos. 900025-WS and 930944-WS were left open to address the final disposition of the escrow account monies and the outstanding penalties and interest. If the Commission approves Staff's recommendation in its entirety, no further action is required and these dockets should be closed.