

State of Florida



Public Service Commission

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DATE: AUGUST 22, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BRUBAKER, HOLLEY)
DIVISION OF ECONOMIC REGULATION (KAPROTH, PEACOCK) *AS JAN met JS*
DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (KNIGHT) *JK*

RE: DOCKET NO. 971622-SU - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST LANDMARK ENTERPRISES, INC. IN HIGHLANDS COUNTY FOR VIOLATION OF RULE 25-30.110(3), F.A.C., RECORDS AND REPORTS; ANNUAL REPORTS, AND RULE 25-30.120, REGULATORY ASSESSMENT FEES.

AGENDA: 09/03/02 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\971622.RCM

CASE BACKGROUND

Landmark Enterprises, Inc. (Landmark or utility) is a Class C Utility located in Highlands County which provides wastewater service to approximately 243 residential customers and 9 general service customers. The utility failed to file annual reports from 1993 to 1996 and failed to remit regulatory assessment fees (RAFs) for 1994 and 1995, as required respectively by Rules 25-30.110 and 25-30.120, Florida Administrative Code.

By Order No. PSC-98-0269-FOF-SU, issued February 10, 1998, the Commission ordered the utility to show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$10,116 for violation of Rule 25-30.110, Florida Administrative Code, by

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failing to file its annual reports from 1993 to 1996. The Commission ordered Landmark to immediately file annual reports from 1993 to 1996, and put the utility on notice that further violations of Rule 25-30.110, Florida Administrative Code, will result in further action by the Commission. Landmark was ordered to show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$385.52 and interest in the amount of \$358.36 for violations of Rule 25-30.120(5)(b), Florida Administrative Code. The utility was also ordered to immediately remit \$3,086.38 in delinquent RAFs for 1994 and 1995. Order No. 98-0269-FOF-SU also provided that if reasonable collection efforts were unsuccessful, the collection of penalties and interest would be forwarded to the Comptroller's office and the docket closed. As discussed in Issue 1, staff is recommending that the Order be modified, and that the Commission order an alternate disposition of the amounts assessed by Order No. PSC-98-0269-FOF-SU.

Although the utility did not request a hearing, it did submit a written response on March 5, 1998, explaining the profound financial difficulties faced by the utility in complying with the requirements of its various regulatory and taxing authorities. Available monies were needed to renew the utility's permit with the Florida Department of Environmental Protection, to pay the mortgage, and to try to maintain the utility's operations. To this end, the utility's owner, Mr. David Plank, invested personal monies into the utility, and personally made all maintenance and repairs, billing and accounting, without compensation. Mr. Plank stated that he was interested in selling the utility, but that the utility's insolvency and regulatory problems made negotiating with potential buyers extremely difficult.

Mr. David Plank also spoke with staff on several occasions regarding whether the utility might be eligible for rate relief pursuant to Section 367.0814, Florida Statutes. However, pursuant to Rule 25-30.455, Florida Administrative Code, acceptance of a petition for staff-assistance in rate-setting depends in part upon whether or not a utility is in compliance with Rules 25-30.110 and 25-30.120, Florida Administrative Code.

Ultimately, in November 2001, staff held a noticed meeting with Mr. Plank regarding the utility's continuing noncompliance with Order No. PSC-98-0259-FOF-SU. Discussions were held regarding whether the utility could make some payment towards the RAFs owed, and whether a current annual report could be filed, in order to

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demonstrate good faith compliance with the Commission's Order and rules. By letter dated December 6, 2001, Mr. Plank provided an update of the utility's status, requested information about a payment plan that might be established for the utility, and stated that he would shortly thereafter complete and file an annual report for 2000.

After several additional discussions with Mr. Plank, on July 22, 2002, staff sent a letter by certified mail to Mr. Plank regarding the updated amounts currently owed for delinquent RAFs and annual reports through 2001, and that the utility make every effort to file at least a current annual report and make an initial payment towards the monies owed. Staff further advised that it intended to bring a recommendation before the Commission regarding the disposition of Order No. PSC-98-0269-FOF-SU, in addition to annual reports owed for 1997-2001, and regulatory assessment fees for 1996-2001. As of the date this recommendation was filed, no payment has been received nor annual report filed by the utility.

Issue 1 of this recommendation addresses the recommended disposition of the penalties and interest owed for the 1993 to 1996 annual reports and RAFs for 1994 and 1995. Issue 2 addresses the utility's failure to file its annual reports from 1997 to 2001 and its failure to remit RAFs for 1996 through 2001.

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ISSUE 1: Should the Commission modify Order No. PSC-98-0269-FOF-SU and order that the penalties and interest for delinquent annual reports and regulatory assessment fees be a lien on the real and personal property of the utility and its directors?

RECOMMENDATION: Yes. Staff recommends that Order No. PSC-98-0269-FOF-SU be modified and that pursuant to Section 367.161, Florida Statutes, the penalty for delinquent annual reports and regulatory assessment fees assessed in that Order, as set forth in the body of staff's recommendation, be a lien on the real and personal property of the utility, enforceable by the Commission as a statutory lien under Chapter 85, Florida Statutes. Pursuant to Chapter 85, the proceeds of such lien should be deposited by the Commission in the General Revenue Fund Unallocated Account.

Further, staff recommends that Order No. PSC-98-0269-FOF-SU be modified so that delinquent regulatory assessment fees be recorded as a lien on the real and personal property of the utility and its directors, and should be enforceable as a lien upon being duly recorded with the Clerk of the County Court in Highlands County pursuant to Section 55.10, Florida Statutes. The Commission should provide notice to the utility and its directors of such lien pursuant to Section 55.10, Florida Statutes. The Commission should pursue collection efforts as appropriate pursuant to Section 69.041, Florida Statutes. The proceeds of such lien should be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes. (BRUBAKER)

STAFF ANALYSIS: By Order No. PSC-98-0269-FOF-SU, Landmark was required to immediately file annual reports from 1993 to 1996, and to remit \$3,086.38 in delinquent regulatory assessment fees for 1994 and 1995. The utility was put on notice that further violations of Rules 25-30.110 and 25-30.120, Florida Administrative Code, would result in further action by the Commission. The Order also provided that if reasonable collection efforts were unsuccessful, the collection of penalties and interest would be forwarded to the Comptroller's office and the docket closed.

As discussed above, staff has made several efforts to work with the utility towards securing compliance with Order No. PSC-98-0269-FOF-SU. Staff acknowledges that the utility has been very frank with staff regarding its extreme financial difficulties. However, the steps required to bring the utility into compliance with the Commission's Order have not been met, and staff does not

believe that further efforts will secure such compliance. Therefore, staff recommends that Order No. PSC-98-0269-SU be modified, and that pursuant to Section 367.161, Florida Statutes, the penalty for delinquent annual reports and regulatory assessment fees assessed in that Order, and as calculated below, be a lien on the real and personal property of the utility, enforceable by the Commission as a statutory lien under Chapter 85, Florida Statutes. The proceeds of such lien shall be deposited by the Commission in the General Revenue Fund Unallocated Account. Staff recommends that the following amounts, calculated through the Agenda date, be assessed as follows:

Regulatory Assessment Fees

<u>Year</u>	<u>RAF Amount</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
1994	\$1,528.29	\$382.07	\$1,375.46	\$3,285.82
1995	1,558.09	389.52	1,215.31	<u>3,162.92</u>
<u>Total:</u>				\$6,448.74

Annual Reports

<u>Year</u>	<u>Time Elapsed</u>	<u>Penalty</u>
1993	3,078 days	\$ 9,234
1994	2,713 days	8,139
1995	2,348 days	7,044
1996	1,982 days	<u>5,946</u>
<u>Total:</u>		\$30,363

Although the collection of penalties are sometimes referred to the Comptroller's office for further collection efforts, as provided for in Order No. PSC-98-0269-FOF-SU, staff believes that more stringent means are called for in light of the utility's continued noncompliance with this Commission's rules and procedures. To this end, staff recommends that Order No. PSC-98-0269-FOF-SU be modified and that pursuant to Section 367.161, Florida Statutes, the penalty for delinquent annual reports and regulatory assessment fees set forth in that Order be a lien on the real and personal property of the utility, enforceable by the Commission as a statutory lien under Chapter 85, Florida Statutes. Pursuant to Chapter 85, the proceeds of such lien should be deposited by the Commission in the General Revenue Fund Unallocated Account.

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Further, staff recommends that Order No. PSC-98-0269-FOF-SU be modified so that delinquent regulatory assessment fees be recorded as a lien on the real and personal property of the utility and its directors, and should be enforceable as a lien upon being duly recorded with the Clerk of the County Court in Highlands County pursuant to Section 55.10, Florida Statutes. The Commission should provide notice to the utility and its directors of such lien pursuant to Section 55.10, Florida Statutes. The Commission should pursue collection efforts as appropriate pursuant to Section 69.041, Florida Statutes. The proceeds of such lien should be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes.

Staff believes that a lien would be a more appropriate vehicle to secure the utility's compliance with this Commission's regulatory requirements, for so long as the utility remains subject to this Commission's regulation. This recommendation is consistent with Order No. PSC-99-0265-FOF-WU, issued February 10, 1999, in Docket No. 980678-SU; and Order No. PSC-98-1005-SC-WU, issued July 24, 1998, in Docket No. 980729-WU.

ISSUE 2: Should Landmark be ordered to show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$13,296 for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual reports from 1997 to 2001; and penalties and interest in the amount of \$6,157.56 for violation of Rule 25-30.120, Florida Administrative Code, by failing to pay its regulatory assessment fees for 1996 through 2001?

RECOMMENDATION: Yes. Staff recommends that Landmark should be ordered to show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$13,296 for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual reports from 1997 to 2001; and penalties and interest in the amount of \$6,157.56 for violation of Rule 25-30.120, Florida Administrative Code, by failing to pay its regulatory assessment fees for 1996 through 2001. The show cause order should incorporate the conditions stated below in the staff analysis. Further, Landmark should immediately file the annual reports from 1997 to 2001, and pay the regulatory assessment fees from 1996 through 2001, and should be put on notice that further violations of Rules 25-30.110 and 25-30.120, Florida Administrative Code, will result in further action by the Commission. (HOLLEY)

STAFF ANALYSIS: 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. Incomplete or incorrect reports are considered delinquent, with a 30 day grace period in which to supply the missing information.

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 C utilities is \$3.00 per day. Staff calculated the penalty based on the number of days elapsed since March 31 and the date of this agenda. The date of this agenda is included in computing the number of days elapsed. Staff notes that the penalty will still accrue until the utility files its annual reports. The Commission may impose lesser or greater penalties, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code.

In establishing rates, the Commission includes in its determination of the revenue requirements the utility's obligation to pay regulatory assessment fees. However, this utility has failed to pay regulatory assessment fees for the period 1996 through 2001.

Pursuant to Section 350.113(4), Florida Statutes, and Rule 25-30.120(5)(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% of the fee if the failure is for not more than 30 days, with an additional 5% for each additional 30 days or fraction thereof during the time in which failure continues, not to exceed a total penalty of 25%.
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(5)(b), Florida Administrative Code, the Commission may impose an additional penalty upon a utility for failure to pay regulatory assessment fees in a timely manner.

As stated in the background, through various discussions with staff and by letter dated July 22, 2002, staff gave Landmark notice that since it had not filed its 1997 through 2001 annual reports or paid its RAFs for 1996 through 2001, and that the utility was in apparent violation of Rule 25-30.110, Florida Administrative Code. The utility was given a final opportunity to pay the RAFs and file the annual reports by August 20, 2002. As of the date of this recommendation, no annual report has been filed and no RAFs have been paid.

Utilities are charged with the knowledge of the Commission's 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 timely file 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., the 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 the utility has expressed its intention to file annual reports during its various discussions with staff, no annual reports have been filed, nor has the utility requested an extension, for 1997 through 2001, in apparent violation of Rule 25-30.110, Florida Statutes. As discussed above, utilities are charged with the knowledge of the Commission's rules and statutes. Thus, the intentional act of failing to file annual reports would meet the standard for a "willful violation." In consideration of the foregoing, staff recommends that Landmark be ordered to show cause, in writing, within 20 days why it should not remit a penalty in the amount of \$13,296 for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual reports from 1997 to 2001. In addition, Landmark should be ordered to immediately file its annual reports from 1996 to 2001, and should be put on notice that further violations of Rule 25-30.110, Florida Administrative Code, will result in further action by the Commission.

Landmark has collected the regulatory assessment fees and not paid them as required by statute. Regulatory assessment fees are intended to defray the costs incurred by this Commission in its regulation of utilities. Although the utility has expressed an interest in establishing a payment plan and has communicated openly with staff, no payment has been made towards the RAFs owed for 1996 through 2001. As discussed above, the intentional act of failing to pay RAFs would meet the standard for a "willful violation." Accordingly, staff recommends that the utility be ordered to show cause, in writing, why it should not remit penalties and interest in the amount of \$6,157.56 for its failure to remit RAFs for 1996 through 2001. Further, Landmark should be ordered to immediately remit a total of \$10,213.56 in delinquent RAFs for those same years.

The utility owes the amounts indicated below. Staff calculated the respective penalties and interest based on the number of days elapsed since the annual reports and RAFs were due and the September 3, 2002 Agenda Conference. Staff notes that

penalties and interest will continue to accrue until the utility files the annual reports and pays the delinquent regulatory assessment fees. The Commission may impose lesser or greater penalties, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code.

Annual Reports

<u>Year</u>	<u>Time Elapsed</u>	<u>Penalty</u>
1997	1,617 days	\$ 4,851
1998	1,252 days	3,756
1999	886 days	2,658
2000	521 days	1,563
2001	156 days	<u>468</u>
<u>Total:</u>		\$13,296

Regulatory Assessment Fees

<u>Year</u>	<u>RAF Amount</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
1996	\$ 1,596.79	\$ 399.20	\$1,053.88	\$ 3,049.87
1997	1,664.82	416.20	899.00	2,980.02
1998	1,699.96	424.99	713.98	2,838.93
1999	1,720.53	430.13	516.16	2,666.82
2000	1,743.93	435.98	313.91	2,493.82
2001	<u>1,787.53</u>	<u>446.88</u>	<u>107.25</u>	<u>2,341.66</u>
<u>Total:</u>	\$10,213.56	\$2,553.38	\$3,604.18	\$16,371.12

Staff further recommends that the show cause order incorporate the following conditions: Landmark's response to the show cause order must contain specific allegations of fact and law. Should Landmark 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 on this matter is made. 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 Landmark fails to file a timely response to the show cause order, the penalty is deemed assessed with no further action required by the Commission. In that event, if Landmark fails to respond to reasonable collection efforts by Commission staff, staff recommends that pursuant to Section 367.161, Florida Statutes, the penalties and

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interest for delinquent annual reports and regulatory assessment fees be a lien on the real and personal property of the utility, enforceable by the Commission as a statutory lien under Chapter 85, Florida Statutes. Pursuant to Chapter 85, the proceeds of such lien should be deposited by the Commission in the General Revenue Fund Unallocated Account.

Further, staff recommends that the delinquent regulatory assessment fees be recorded as a lien on the real and personal property of the utility and its directors, and should be enforceable as a lien upon being duly recorded with the Clerk of the County Court in Highlands County pursuant to Section 55.10, Florida Statutes. The Commission should provide notice to the utility and its directors of such lien pursuant to Section 55.10, Florida Statutes. The Commission should pursue collection efforts as appropriate pursuant to Section 69.041, Florida Statutes. The proceeds of such lien should be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes.

Although the collection of penalties are sometimes referred to the Comptroller's office for further collection efforts, as discussed in Issue 1, staff believes in this instance that a lien would be a more appropriate vehicle to secure the utility's compliance with this Commission's regulatory requirements, for so long as the utility remains subject to this Commission's regulation. See Order No. PSC-99-0265-FOF-WU, issued February 10, 1999, in Docket No. 980678-SU, and Order No. PSC-98-1005-SC-WU, issued July 24, 1998, in Docket No. 980729-WU.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. If Landmark responds to the show cause order by paying the penalty and filing the annual reports for 1997 through 2001, and by paying 1996 through 2001 RAFs and remitting all associated penalties and interest, this docket should be closed administratively once the Commission's Order modifying Order No. PSC-98-0269-FOF-SU has been appropriately filed with the Clerk of the County Court of Highlands County and the liens recorded. If Landmark fails to timely respond to the show cause order and fails to respond to Commission staff's reasonable collection efforts, then this docket should be closed administratively once the Commission's order has been appropriately filed with the Clerk of the County Court of Highlands County and the liens recorded with respect to the 1997 through 2001 annual reports and 1996 through 2001 RAFs. If Landmark responds to the show cause order and requests a hearing, this docket should remain open for final disposition. (BRUBAKER, HOLLEY)

STAFF ANALYSIS: If Landmark responds to the show cause order by paying the penalty and filing the annual reports for 1997 through 2001, and by paying 1996 through 2001 RAFs and remitting all associated penalties and interest, this docket should be closed administratively once the Commission's Order modifying Order No. PSC-98-0269-FOF-SU has been appropriately filed with the Clerk of the County Court of Highlands County and the liens recorded. If Landmark fails to timely respond to the show cause order and fails to respond to Commission staff's reasonable collection efforts, then this docket should be closed administratively once the Commission's order has been appropriately filed with the Clerk of the County Court of Highlands County and the liens recorded with respect to the 1997 through 2001 annual reports and 1996 through 2001 RAFs. If Landmark responds to the show cause order and requests a hearing, this docket should remain open for final disposition.