

State of Florida



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-

RECEIVED-TPSC  
02 DEC -5 AM 10:41  
COMMISSION CLERK

**DATE:** DECEMBER 5, 2002

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

**FROM:** OFFICE OF THE GENERAL COUNSEL (JAEGER) *West*  
DIVISION OF ECONOMIC REGULATION (KAPROTH) *KE DM*  
DIVISION OF COMMISSION CLERK AND ADMINISTRATIVE SERVICES (KNIGHT) *JK JDT JDT*

**RE:** DOCKET NO. 021058-WS - DISPOSITION OF DELINQUENT REGULATORY ASSESSMENT FEES AND PENALTIES FOR DEBARY ASSOCIATES, INC., ECON UTILITIES CORPORATION, AND SANDALHAVEN UTILITY, INC.

**AGENDA:** 12/17/02 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\021058.RCM

CASE BACKGROUND

DeBary Associates, Inc. (DeBary) owes regulatory assessment fees (RAFs) for January-May 2000, Sandalhaven Utility, Inc. (Sandalhaven), owes RAFs for January-March 1999, and Econ Utilities Corporation (Econ) owes RAFs for January-February 1996. Pursuant to Rule 25-30.120(2), Florida Administrative Code, the obligation to remit RAFs for any year shall apply to any utility which is subject to this Commission's jurisdiction on or before December 31 of that year.

A small percentage of utilities, usually Class C, do not pay their RAFs each year. Often these utilities are bought by larger utilities, acquired by governmental entities, abandoned, or they become exempt. The transfer of these utilities makes it difficult

DOCUMENT NUMBER-DATE

13286 DEC-58

FPSC-COMMISSION CLERK

for the Commission to track, let alone collect, the delinquent RAFs. Further, pursuant to Section 350.113(4), Florida Statutes, and Rule 25-30.120(7), Florida Administrative Code, a statutory penalty plus interest shall be assessed against any utility that fails to timely pay its RAFs. In addition, pursuant to Sections 367.145(1)(b) and 367.161, Florida Statutes, and Rule 25-30.120(7)(b), Florida Administrative Code, the Commission may impose an additional penalty upon a utility for failure to pay RAFs in a timely manner.

This docket was opened in order for staff to address this failure of DeBary, Sandalhaven, and Econ to pay outstanding RAFs, plus any applicable penalties and interest. Generally, unpaid RAFs are calculated based on the annual report for the year RAFs were due. Revenues reported are multiplied by the applicable RAF rate. However, where a utility does not have an annual report on file for the year RAFs were due, staff estimates the revenues and resulting RAFs due. For the years in question, staff calculated the penalties and interest, in accordance with Rule 25-30.120(7)(a), Florida Administrative Code, based on the number of days that have elapsed since the respective RAFs were due and the date of this agenda conference. The RAF, penalties and interest each utility owes is detailed in the staff analysis for each utility.

This recommendation specifically addresses whether DeBary, Sandalhaven or Econ should be ordered to show cause, in writing, within 21 days, why each utility should not remit RAFs, statutory penalties, and interest in their respective amounts for their apparent violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to pay RAFs, and the associated penalties and interest.

Although these utilities are no longer regulated by the Commission, the Commission maintains jurisdiction to pursue collection efforts of the delinquent RAFs pursuant to Sections 367.071(2), 367.145, 367.161, and 367.171(5), Florida Statutes.

**ISSUE 1:** Should the utilities identified in the staff analysis be ordered to show cause, in writing, within 21 days, why they should not remit RAFs, statutory penalties, and interest in their respective amounts for their apparent violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to timely pay regulatory assessment fees (RAFs)?

**RECOMMENDATION:** No. Show cause proceedings should not be initiated. Staff further recommends that the Commission refer the utilities' unpaid RAFs and associated penalties and interest to the State Comptroller's Office, Department of Banking and Finance, for permission to write off the accounts as uncollectible, in the amounts identified in the staff analysis. (JAEGER, KAPROTH, KNIGHT)

**STAFF ANALYSIS:** In establishing rates, the Commission includes in its determination of the revenue requirements the utility's obligation to pay RAFs. However, as noted above, DeBary, Econ, and Sandalhaven failed to pay RAFs for the times indicated. Although one utility was abandoned and the other two were transferred, the delinquent utilities remain responsible for those fees pursuant to Section 367.071(2), Florida Statutes.

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 RAFs, in the following manner:

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

Before staff proceeds with its analysis on this issue, staff believes that a brief history of each delinquent utility would assist the Commission in determining whether each utility should be ordered to show cause, in writing, within 21 days, why they should not remit RAFs, statutory penalties, and interest in their

respective amounts for their apparent violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to timely pay RAFs.

DELINQUENT UTILITIES

1) DeBary Associates, Inc. (DeBary or utility)

Pursuant to its 1999 Annual Report, DeBary was a Class C water and wastewater utility serving approximately 259 water customers and 254 wastewater customers with combined gross revenues of \$85,053 and a combined net operating loss of \$4,128.

On March 6, 2000, the utility gave notice of the abandonment of the utility pursuant to Section 367.165, Florida Statutes, to become effective June 1, 2000. The Commission acknowledged the notice of abandonment by Order No. PSC-00-1083-FOF-WS, issued June 5, 2000.

On May 24, 2000, Volusia County (County) petitioned the Circuit Court in and for Volusia County for appointment as receiver for the utility. The County began operating the utility on June 1, 2000, which was the effective date of the abandonment.

By Order dated January 31, 2001, the Circuit Court officially appointed Volusia County as the receiver for DeBary in Case No. 2000-10603-CIDL. The term of the receiver's appointment began on the date of the Circuit Court Order and continues until further order of the Circuit Court.

The utility was current on its annual reports and RAFs through 1999. Pursuant to Section 367.022(2) Florida Statutes, systems owned, operated, managed, or controlled by governmental authorities are exempt from regulation by this Commission. Therefore, for the purposes of determining RAFs for 2000, this Commission's regulation effectively ended June 1, 2000.

Pursuant to Order No. PSC-01-0999-FOF-WS, issued April 23, 2002, in Docket No. 000292-WS, and in accordance with Rule 25-30.120(2), Florida Administrative Code, the owner of DeBary, Mr. Charles Shalett, remained responsible for the RAFs for the period of January through May of 2000. However, Mr. Shalett was not required to file a 2000 annual report, since the utility was not jurisdictional as of December 31, 2000, pursuant to Rule 25-

30.110(3), Florida Administrative Code. However, in Order No. PSC-01-0999-FOF-WS, the Commission ordered Mr. Shalett to file revenue information using the appropriate pages from the annual report along with its 2000 RAFs form and payment. In that same Order, the Commission acknowledged the appointment of the County as the receiver for DeBary, and canceled Certificates Nos. 061-W and 060-S.

By letter dated November 28, 2001, staff determined that DeBary owed a total of \$2,062.76, and requested that DeBary pay this amount by November 30, 2001. This consisted of RAFs of \$1,550.96, penalties of \$387.73, and interest of \$124.07. However, staff never received any response to this letter.

2) Sandalhaven Utility, Inc. (Sandalhaven or utility)

Sandalhaven was a Class C utility, serving approximately 623 wastewater customers in Charlotte County. The annual report for 1996 shows operating revenues of \$161,918 and a net operating loss of \$41,249.

Sandalhaven was transferred and merged with CHP Utility, Inc. (CHP) in 1996, a non-profit association providing service solely to its members. The Commission approved this transfer by Order No. PSC-97-1150-FOF-SU, issued September 30, 1997, in Docket No. 970381-SU, and found that the utility was exempt from regulation pursuant to Section 367.022(7), Florida Statutes, and canceled Sandalhaven's Certificate No. 495-S.

However, on May 1, 1998, a Motion to Rescind Order No. PSC-97-1150-FOF-SU was filed, stating that a settlement could not be reached regarding the use of CHP, a member-owned not-for-profit corporation, to own and operate the Sandalhaven facilities. By Order No. PSC-98-1248-FOF-SU, issued September 21, 1998, in Docket No. 970381-SU, the Commission granted the motion to rescind. Certificate No. 495-S was reinstated to Sandalhaven when Order No. PSC-97-1150-FOF-SU was rescinded.

On September 24, 1998, Utilities, Inc. of Sandalhaven (Utilities, Inc.) filed an application for authority to transfer Certificate No. 495-S from Sandalhaven to Utilities, Inc. Sandalhaven closed on the transfer of its facilities to Utilities, Inc., on March 30, 1999, prior to obtaining Commission approval. Although this was an apparent violation of Section 367.071, Florida

DOCKET NO. 021058-WS  
DATE: DECEMBER 5, 2002

Statutes, pursuant to Order No. PSC-99-2114-PAA-SU, issued October 25, 1999, in Docket No. 981221-SU, as consummated by Order No. PSC-99-2270-CO-SU, issued November 18, 1999, the Commission determined that no show cause proceeding would be initiated. However, that Order did state that Sandalhaven would remain responsible for the existing debts of the utility incurred or accrued up to closing, which includes RAFs.

The Order further found that the utility was current on its RAFs and had filed an annual report for 1996 and all prior years. Based on its temporary transfer to CHP, the utility was exempt from filing an annual report and regulatory assessment fees for the year 1997 and part of 1998. However, Sandalhaven was found to owe regulatory assessment fees for 1998 from December 7, 1998, through December 31, 1998, and through March 30, 1999. That Order further held Utilities, Inc., to be responsible for the regulatory assessment fees associated with revenues collected after March 30, 1999.

By check in the amount of \$980.25, dated March 29, 1999, Sandalhaven paid the 1998 RAFs. However, it did not pay the RAFs due from January 1, 1999, through March 30, 1999.

By letter dated November 19, 2001, staff attempted to collect the RAFs plus penalty and interest for the January 1, 1999, through March 30, 1999, period. In that letter, staff calculated the interest due to be \$433.81 through November 30, 2001. Also, staff calculated the RAF amount to be \$2,169.05, and the penalty amount to be \$542.26.

Mr. Robert W. Spade responded to this letter on behalf of Sandalhaven by letter dated November 30, 2001. In his letter, Mr. Spade stated that he was forwarding the collection letter to both the "corporate attorney and the CPA who were involved in the sale of Sandalhaven." However, nothing further was heard from the utility until staff counsel contacted Mr. Spade in late October, 2002, shortly after this docket was opened. Staff Counsel also contacted the CPA, Ray Flischal, and both he and Mr. Spade seemed to be surprised that everything had not already been taken care of. They both expressed a desire to pay what was owed, but Mr. Spade thought that the penalties should be waived or abated because this was a mere oversight and staff had not attempted to collect the amounts due for January-March, 1999, until November 19, 2001.

Staff counsel advised the CPA that the penalty and the RAF amount remained as shown in the November 19, 2001, collection letter. However, because payment had not been received by November 30, 2001, the interest had increased from \$433.81 to \$694.09.

Despite having been advised by staff counsel that the penalties were statutory (see Section 350.113(4), Florida Statutes), and that the Commission did not have the power or authority to waive or abate them, by cover letter dated November 6, 2002, Mr. Spade submitted two checks in the amounts of \$2,169.05 (principal amount) and \$433.81 (interest through November 2001), with the condition that the two checks be accepted as full settlement for all outstanding indebtedness.

By letter dated November 13, 2002, staff counsel responded to Mr. Spade and advised him that the penalty and interest were statutory and that neither staff nor the Commission had the power to waive the requirement that these amounts be collected. Mr. Spade called staff counsel on November 19, 2002, and after discussing the situation, and noting that the utility had been dissolved for some time, stated that the Commission could deposit the checks submitted if it would refer the associated penalty and remaining interest to the State Comptroller's Office, Department of Banking and Finance, for permission to write off the remaining accounts as uncollectible.

Mr. Spade stated that this utility had tried to do everything correctly, and that under the circumstances of this case, it just was not fair to impose a penalty some 44 months after the transfer occurred. Therefore, he stated that he would not voluntarily pay the penalty. With his refusal to pay more, this leaves \$260.28 in interest and \$542.26 in penalties due, for a total amount of \$802.54.

### 3) Econ Utilities Corporation (Econ or utility)

Econ is a Class B utility providing service in Orange County to approximately 725 customers. In 1995, Econ recorded operating revenues of \$210,666 for water service and \$317,000 for wastewater service. During 1995, Econ reported that operating losses of \$63,680 for water service and \$95,430 for wastewater service were incurred.

On February 27, 1996, Mr. Carl J. Wenz, Vice President of Regulatory Matters for Wedgefield Utilities, Inc. (Wedgefield) filed an application for the transfer of Certificates Nos. 404-W and 341-S from Econ to Wedgefield. Wedgefield was incorporated on January 23, 1996, as a Florida corporation, and is a wholly-owned subsidiary of Utilities, Inc., which focuses on ownership and operation of small systems and provides centralized management, accounting and financial assistance to small utilities that were commonly built by development companies.

The final closing date for this transaction was scheduled to take place within ten (10) days of Commission approval of the proposed transfer. An interim closing occurred on February 8, 1996, at which time various operating records and ownership documents were exchanged. Wedgefield has provided interim management of the utility system since the interim closing, subject to this Commission's approval of the proposed transfer.

By Order No. PSC-96-1241-FOF-WS, issued October 7, 1996, in Dockets Nos. 960235-WS and 960283-WS, this Commission, by final agency action, approved the transfer. However, that Order did not delineate when Wedgefield would become responsible for RAFs, and Econ never paid the RAFs due for the period January 1, 1996, through February 8, 1996.

By three letters, sent to three separate addresses, dated October 16, 2002, staff attempted to collect the past due RAFs plus penalty and interest. However, one letter was returned as undeliverable, and, in response to the other letters, staff only received a telephone call from Mr. Forrer who stated that the agreement between Econ and Wedgefield (Utilities, Inc.) was that Utilities, Inc., would be responsible for all of 1996. Staff has contacted Wedgefield and reviewed its 1996 Annual Report, and it appears that Wedgefield is only taking responsibility for RAFs as of February 8, 1996, the date of the interim closing.

#### RESPONSIBILITY FOR REGULATORY ASSESSMENT FEES

Regulatory assessment fees are intended to cover the costs incurred by this Commission in the regulation of utilities. Staff's calculation of the RAFs, plus penalty and interest for each of the utilities for the appropriate periods is set out below. As of December 31, 2002, the amounts due would be as follows:



DEBARY

<u>RAF*</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$1,594.74	\$398.69	\$334.90	\$2,328.33

\*The RAF, for the period January-May, 2000, is calculated based on actual revenues of \$16,715.83 for water and \$18,722.92 for wastewater for the period January-May, 1999.

SANDALHAVEN

	<u>RAF*</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
<u>Amount Due</u>	\$2,169.05	\$542.26	\$694.09	\$3,405.40
<u>Amount Paid</u>	\$2,169.05	\$0	\$433.81	\$2,602.86
Amnt. Remaining	\$0	\$542.26	\$260.28	\$ 802.54

\*Based on estimated revenues of \$48,200.58 for January-March, 1999.

ECON

<u>RAF*</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$3,962.77	\$990.69	\$2,734.31	\$7,687.78

\*Based on revenues of \$35,110.91 for water and \$52,950.77 for wastewater for period January-February, 1996.

Despite DeBary, Sandalhaven, and Econ apparently being responsible for the RAFs in the amounts and for the times indicated, and despite staff's collection efforts, the utilities have not paid the RAFs, plus penalties and interest due.

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 utilities' failure to pay RAFs, plus applicable penalties and interest, 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.

Staff believes that the utilities' failure to pay RAFs rises to a level that would ordinarily warrant a show cause proceeding. However, DeBary was abandoned, and Sandalhaven and Econ were transferred to Utilities, Inc. In the Sandalhaven case, the Commission specifically found that Utilities, Inc., was responsible for RAFs subsequent to March 30, 1999, and that Sandalhaven remained responsible for RAFs prior to that date. In Econ, the Commission noted that an interim transfer occurred as of February 8, 1996, and Utilities, Inc. appears to have taken responsibility for RAFs from that date forward. However, from January 1, 1996, to February 8, 1996, it appears that Econ would remain liable for RAFs and applicable penalties and interest.

As noted above, DeBary was an abandonment case and DeBary's corporate entity has been dissolved. Under certain conditions, the directors and shareholders of a dissolved corporation can be held responsible for a distribution of funds prior to the payment of RAFs. Section 607.06401(3), Florida Statutes, provides in pertinent part:

No distribution may be made, if after giving it effect:  
(a) The corporation would not be able to pay its debts as they become due in the usual course of business . . . .

Section 607.0834(1), Florida Statutes, provides in pertinent part:

A director who votes for or assents to a distribution made in violation of s. 607.06401 . . . is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating s. 607.06401 . . . if it is established that he did not perform his duties in compliance with s. 607.0830.

To hold a director liable under Section 607.0830, Florida Statutes, it must essentially be shown that the director made the unlawful distribution in bad faith. Furthermore, for a director to be held liable for an unlawful distribution, a proceeding must be "commenced within 2 years after the date on which the effect of the distribution was measured . . . ." Section 607.0834(3), Florida

Statutes. In this case, staff does not know when distributions, if any, were made. Therefore, it is unclear when the time began to run for holding the directors liable. Because DeBary was not dissolved until September 21, 2001, it would appear that a proceeding against the directors would not be barred. However, because this was an abandonment, it is doubtful whether there was any distribution whatsoever.

Section 607.1406(13), Florida Statutes, provides that a shareholder of a dissolved corporation is not liable for any claim against the corporation which is brought after three years of the effective date of dissolution. Therefore, a proceeding against the shareholders could also still be commenced. However, because DeBary is an abandonment and it appears that the County took over all assets of the utility, it appears that there could be very little that could have been distributed to the shareholders.

Pursuant to the Department of State, Division of Corporations, Sandalhaven Utility, Inc., became RWS Investments, Inc., and is still active. Robert Spade is listed as an officer and director. Mr. Spade is adamant that he should not be made to pay the penalty and has indicated that he will resist further collection efforts. Staff believes that further collection efforts by staff would prove futile. Therefore, staff recommends that the Commission accept Mr. Spade's offer of settlement. Pursuant to this settlement offer, the Commission would deposit the two checks totaling \$2,602.86, and refer the associated penalty and remaining interest to the State Comptroller's Office, Department of Banking and Finance, for permission to write off the remaining accounts as uncollectible. This would leave \$260.28 in remaining interest and \$542.26 in penalties due, for a total amount of \$802.54.

Also, for Econ, staff notes that the physical transfer to Wedgefield occurred on February 8, 1996, and that the Commission approved the transfer by Order dated October 7, 1996. Also, staff has talked with Mr. Forrer of Magna Properties, Inc. (Magna), the successor corporation to Econ, and he states that Magna does not have any employees and has less than \$1,000 in assets. Moreover, he states that it has now been over six years since the transfer, that there are no records remaining, and that he basically saw no point in further responding to staff's collection efforts.

Based on the foregoing, staff believes that a show cause proceeding and further collection efforts against any of these

DOCKET NO. 021058-WS  
DATE: DECEMBER 5, 2002

utilities would not be cost effective. Staff has already made an attempt by letters dated November 28, 2001, November 19, 2001, and October 16, 2002, to collect the delinquent RAFs, penalties and interest due from DeBary, Sandalhaven, and Econ, respectively. Staff believes that any further attempts to collect would be futile because, in these instances, the utilities' corporate entities either no longer exist, are mere shells, or are not currently regulated by this Commission.

Therefore, staff recommends that show cause proceedings not be initiated against the aforementioned utilities for failure to pay RAFs. Staff further recommends that the Commission refer this matter to the State Comptroller's Office, Department of Banking and Finance, for permission to write off these accounts as uncollectible.

DOCKET NO. 021058-WS  
DATE: DECEMBER 5, 2002

**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** Yes. Because no further action is necessary, this docket should be closed. (JAEGER, KNIGHT, KAPROTH)

**STAFF ANALYSIS:** Because no further action is necessary, this docket should be closed.