

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Disposition of delinquent regulatory assessment fees and delinquent annual reports and penalties for Weber Investment Corporation in Putnam County and Sand Dollar Properties, Inc. in Lee County.

DOCKET NO. 021035-SU
ORDER NO. PSC-03-0018-FOF-SU
ISSUED: January 3, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS;
DECLINING TO ASSESS PENALTIES; DECLINING TO REQUIRE FILING OF
ANNUAL REPORTS; REFERRING DELINQUENT REGULATORY ASSESSMENT FEES
AND ASSOCIATED PENALTIES AND INTEREST TO THE OFFICE OF THE STATE
COMPTROLLER; AND CLOSING THE DOCKET

BY THE COMMISSION:

BACKGROUND

Sand Dollar Properties, Inc. (Sand Dollar) has failed to file its annual report for 1996 and regulatory assessment fees (RAFs) from May 1993 through 1996 as required by Order No. PSC-97-0833-FOF-SU, issued July 11, 1997, in Docket No. 960063-SU. Also, Weber Investment Corporation (Weber) has failed to file its annual reports from 1993 through June 4, 1996, and failed to pay its RAFs for the years 1992 through June 4, 1996, as required by Order No. PSC-98-0446-FOF-WS, issued March 30, 1998, in Docket No. 980271-WS. Both Sand Dollar and Weber were Class C utilities. Sand Dollar is an exempt entity, but was not found to be exempt until 1997. Weber

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ORDER NO. PSC-03-0018-FOF-SU
DOCKET NO. 021035-SU
PAGE 2

abandoned the utility giving notice on May 13, 1996, and Putnam County was appointed as receiver on June 4, 1996.

Rule 25-30.110, Florida Administrative Code, requires utilities subject to our jurisdiction as of December 31 of each year to file an annual report on or before March 31 of the following year. Pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to timely file a complete annual report is subject to penalties (\$3 per day late for Class C utilities), absent demonstration of good cause for noncompliance.

Pursuant to Rule 25-30.120(2), Florida Administrative Code, the obligation to remit the RAF for any year shall apply to any utility which was subject to our 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 become exempt. The transfer of these utilities makes it difficult for this 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, we may impose an additional penalty upon a utility for failure to pay RAFs in a timely manner.

This docket was opened in order to address this failure of Sand Dollar and Weber to file annual reports and 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 would be multiplied by the applicable RAF rate. However, in this case neither utility had an annual report on file for the year RAFs were due. Therefore, for Weber, we estimated the revenues and resulting RAFs due based on a prior year annual report. Also, for Sand Dollar, we had previously determined that there were no applicable revenues, and so the applicable minimum annual RAF of \$25 for wastewater for each of the years in question was used. See Rule 25-30.120(1), Florida Administrative Code. For the years in question, we calculated the

ORDER NO. PSC-03-0018-FOF-SU
DOCKET NO. 021035-SU
PAGE 3

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 by year is detailed below for each utility.

This Order specifically addresses whether Sand Dollar or Weber should be ordered to show cause, in writing, within 21 days, why each utility should not be fined for failure to comply with Rule 25-30.110(3)(a), Florida Administrative Code, whether the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, should be assessed against each utility, whether each utility should be required to file annual reports for the years indicated, and whether Sand Dollar and Weber 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 pay delinquent RAFs.

Although these utilities are no longer regulated by this Commission, we maintain jurisdiction to pursue collection efforts for the failure to file annual reports and timely pay RAFs pursuant to Sections 367.071(2), 367.145, 367.161, and 367.171(5), Florida Statutes.

FAILURE TO FILE ANNUAL REPORT

As stated above, Rule 25-30.110(3), Florida Administrative Code, requires utilities subject to our jurisdiction as of December 31 of each year to file an annual report on or before March 31 of the following year. Annual reports are considered filed on the day they are postmarked or received by the Commission. Both Sand Dollar and Weber are in apparent violation of Rule 25-30.110(3), Florida Administrative Code, for their failure to file annual reports. Pursuant to Order No. PSC-97-0833-FOF-SU, Sand Dollar should have filed an annual report for 1996. Pursuant to Order No. PSC-98-0446-FOF-WS, Weber should have filed annual reports for the years 1993 through June 4, 1996.

Our analysis of whether a show cause proceeding and the imposition of fines, penalties, and interest are appropriate for

the failure of each of these utilities to file annual reports is set forth below.

A. History of Each Utility

1. Sand Dollar Properties, Inc.

Capital Sunbelt/Fund '84 Ltd. (Capital Sunbelt) provided wastewater service as a Class C utility in Lee County. The system was originally certificated as Fort Myers Beach Campground Utilities, Inc. (FMBC), and was granted Certificate No. 271-S. On February 5, 1985, Order No. 14060 approved the transfer of Certificate No. 271-S from FMBC to Capital Sunbelt. On June 28, 1988, Capital Sunbelt entered into an agreement with Lee County (County) to receive bulk wastewater service from the County. Pursuant to this agreement, Capital Sunbelt dismantled its treatment plant. Currently, only the collection lines are in operation.

In May, 1993, Sand Dollar Properties, Inc. (Sand Dollar) acquired the wastewater facilities from Capital Sunbelt through a transaction similar to a foreclosure proceeding; via a default on the loan commitment. Capital Sunbelt defaulted on its loan commitments and Sand Dollar, with Harry Cutcher as its principal, accepted a quitclaim deed in lieu of foreclosure on the wastewater facilities. Because the utility was acquired through a default of Capital Sunbelt, there was no contract for sale. Instead the two parties executed a quitclaim deed on May 5, 1993, which purported to transfer all of Capital Sunbelt's rights, title, interest, and claim in the property on which the facility was located to Sand Dollar. At the time of this transfer, the wastewater treatment facility had not been operational for five years prior due to the interconnection with Lee County in 1988.

On January 17, 1996, Capital Sunbelt applied for a transfer of Capital Sunbelt's wastewater system (Wastewater Certificate No. 271-S in Lee County) to Sand Dollar. Based on the campground's method of operating, Sand Dollar requested that it be found to be exempt pursuant to Section 367.022(5), Florida Statutes (landlord/tenant exemption). The last available annual report for 1992 shows that the annual operating revenue for the system was \$0 and the net operating loss was \$13,987.

ORDER NO. PSC-03-0018-FOF-SU
DOCKET NO. 021035-SU
PAGE 5

In the Order approving the transfer (Order No. PSC-97-0833-FOF-SU), this Commission noted:

Sand Dollar has operated the wastewater system since May, 1993. Pursuant to Section 367.145, Florida Statutes, each utility is responsible for paying annual regulatory assessment fees. Therefore, Sand Dollar shall be put on notice that it will be responsible for filing a 1996 annual report and for payment of all outstanding regulatory assessment fees from May, 1993 through 1996. The collection of regulatory assessment fees shall be addressed in a separate docket.

In that same Order, we further noted that:

Sand Dollar has requested recognition as an exempt entity pursuant to Section 367.022(5), Florida Statutes (the landlord/tenant exemption). According to the . . . owner of Sand Dollar Properties and FMBC, the wastewater service is being provided to the tenants of the FMBC without specific compensation. . . . Section 367.022(5), Florida Statutes, states that landlords providing service to their tenants without specific compensation for the service are exempt from our regulation.

We also noted that "the statute was changed on July 1, 1996 to allow exemptions to become self-executing," but that "this case was filed prior to the statute's effective date." Therefore, we recognized that Sand Dollar was an exempt utility, and canceled Certificate No. 271-S.

By letter dated June 4, 1997, our staff attempted to collect the delinquent RAFs for 1996. However, that letter was sent to Capital Sunbelt and not Sand Dollar. Therefore, on October 28, 2002, after the opening of this docket, our staff sent another letter to Sand Dollar attempting to collect all past due RAFs, penalties, and interest. However, as of December 5, 2002, the date our staff filed its recommendation, no response to this latter letter had been received.

2. Weber Investment Corporation

Although Weber had been operating since 1972, this Commission did not learn of its existence until October 1992. On June 29, 1994, by Order No. PSC-94-0805-FOF-SU, we granted Weber Certificate No. 491-S.

On May 13, 1996, pursuant to Section 367.165, Florida Statutes, Weber gave notice of abandonment. On June 4, 1996, the Circuit Court of the Seventh Judicial Circuit appointed Putnam County as interim receiver, and the County immediately took over operation of the utility. By Order No. PSC-96-1087-FOF-SU, issued August 23, 1996, in Docket No. 960800-SU, we acknowledged the abandonment and appointment, and further acknowledged that Putnam County was exempt from regulation.

Moreover, by Order No. PSC-98-0446-FOF-WS, we stated as follows:

Pursuant to Rule 25-30.110, Florida Administrative Code, Weber was responsible for filing annual reports while operating under our jurisdiction. Likewise, pursuant to Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, Weber was responsible for paying regulatory assessment fees during that period. Weber failed to file annual reports for 1993 through June 4, 1996. Weber also failed to pay regulatory assessment fees for 1992 through June 4, 1996. Weber's obligation to file annual reports and pay regulatory assessment fees ended on June 4, 1996 when Putnam County was appointed receiver. Putnam County does not owe regulatory assessment fees because it is exempt from our regulation pursuant to Section 367.022(2), Florida Statutes.

Based on the foregoing, we find that Weber Investment Corporation is responsible for filing annual reports and paying regulatory assessment fees, as set forth above. We will address the collection of these reports and fees, including appropriate penalties and interest, in a separate docket after internal collection efforts are attempted.

By letter dated June 4, 1997, our staff attempted to collect the delinquent RAFs for 1996. However, our staff never received any response to this letter.

B. Show Cause Proceeding, Need for Annual Reports, and Appropriateness of Penalties and Interest

Utilities are charged with the knowledge of our 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 timely file annual reports, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, entitled 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., 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 "in our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Section 367.161, Florida Statutes, authorizes us to assess a penalty of not more than \$5,000 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.

Moreover, pursuant to Rules 25-30.110(6)(c) and (7), Florida Administrative Code, any utility that fails to file a timely, complete annual report is subject to a penalty of \$3 per day, absent demonstration of good cause for noncompliance. Using this \$3 figure and multiplying by the number of days from the time the annual report(s) were due through December 17, 2002, the day of our vote, the total penalty for Sand Dollar's annual report for the year 1996 would be \$6,261. Using this same procedure for Weber's annual reports for the years 1993 through June 4, 1996, the total penalty would be \$31,620.

These penalties, if assessed, would continue to accrue until such time as Sand Dollar and Weber file their annual reports for the respective years. Pursuant to Rule 25-30.110(6)(c), Florida

Administrative Code, we may, in our discretion, impose greater or lesser penalties for such noncompliance.

However, we find that the circumstances in these cases are such that show cause proceedings should not be initiated and the penalties should not be assessed. As discussed above, Sand Dollar has always operated the utility such that it would be exempt pursuant to Section 367.022(5), Florida Statutes (landlords providing service to their tenants without specific compensation for the service). Moreover, pursuant to Weber's notice of abandonment, Putnam County was appointed receiver and began its receivership on June 4, 1996. By Order No. PSC-96-1087-FOF-SU, issued August 23, 1996, in Docket No. 960800-SU, we acknowledged the abandonment and appointment, and further acknowledged that Putnam County was exempt from regulation. Also, by Order No. PSC-98-0446-FOF-WS, issued March 30, 1998, we canceled Certificate No. 491-S. In addition, we acknowledged that pursuant to Section 367.022(2), Florida Statutes, utility systems owned, managed, or controlled by governmental authorities are exempt from our regulation. Because these utilities are no longer subject to our regulation, the information contained in the annual reports for the years indicated are no longer needed by us. Finally, it appears that it would be futile to attempt any further collection efforts.

For the foregoing reasons, we find that the apparent violation of Rule 25-30.110(3), Florida Administrative Code, does not rise in these circumstances to the level of warranting the initiation of a show cause proceeding. Therefore, we shall not order Sand Dollar or Weber to show cause, in writing within 21 days, why they should not be fined for their failure to file annual reports for the years indicated. Further, the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, shall not be assessed, as the information contained in the delinquent reports is no longer needed for the ongoing regulation of the utilities. Additionally, neither Sand Dollar nor Weber shall be required to file their annual reports for the years indicated.

FAILURE TO PAY DELINQUENT RAFS

In establishing rates, we include in our determination of the revenue requirements the utility's obligation to pay RAfs. However, as noted above, both Sand Dollar and Weber failed to pay

RAFs for the years indicated. Although one utility was abandoned and the other one has now been determined to be exempt, 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.

As noted above, pursuant to Order No. PSC-97-0833-FOF-SU, we determined that the transfer from Capital Sunbelt to Sand Dollar should be approved. However, that same Order, despite recognizing that Sand Dollar would be exempt on a going forward basis, determined that Sand Dollar would remain responsible for payment of all outstanding RAFs from May, 1993 through 1996, the collection of which would be addressed in a separate docket. Moreover, by Order No. PSC-98-0446-FOF-WS, we found that Weber, having abandoned the utility, remained responsible for paying RAFs for 1992 through June 4, 1996.

Our calculation of the RAFs, plus penalty and interest for each of the utilities for the periods indicated above is set out below. As of December 31, 2002, the amounts due would be as follows:

SAND DOLLAR

<u>RAF*</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$100	\$25	\$87	\$212

ORDER NO. PSC-03-0018-FOF-SU
DOCKET NO. 021035-SU
PAGE 10

*Pursuant to Order No. PSC-97-0833-FOF-SU, there were no water and wastewater revenues for the period in question. Therefore, the minimum amount would be assessed for all four years.

WEBER

<u>RAF**</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$2,785.68	\$696.42	\$2,678.98	\$6,161.08

**Based on estimated revenue in 1992 pursuant to Order No. PSC-98-0446-FOF-WS, and for years 1992 through June 4, 1996.

Regulatory assessment fees are intended to cover the costs incurred by this Commission in the regulation of utilities. Despite Sand Dollar and Weber having been found by this Commission to be responsible for the RAFs for the times indicated, neither utility has paid the RAFs which are now past due.

Utilities are charged with the knowledge of this Commission's rules and statutes. Additionally, as stated above " 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow. 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." Also, as stated above, in Order No. 24306, having found that the company had not intended to violate the rule, we nevertheless found it appropriate to order the utility to show cause why it should not be fined.

Ordinarily, the utilities' failure to pay RAFs rises to a level that would warrant a show cause proceeding. However, Sand Dollar was found to be exempt from our jurisdiction as of the end of 1996.

Moreover, Weber is an abandonment case and Weber's corporate entity has been dissolved. Under certain conditions, the directors and shareholders of a dissolved corporation could be held responsible for a distribution of funds prior to the payment of RAFs. However, because this was 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.

ORDER NO. PSC-03-0018-FOF-SU
DOCKET NO. 021035-SU
PAGE 11

Based on the foregoing, we find that a show cause proceeding and further collection efforts would not be cost effective. Our staff has already made attempts by letters dated June 7, 1997, to collect the delinquent RAFs, penalties and interest due for the year 1996 from Sand Dollar and for the years 1992 through June 4, 1996 for Weber. However, because one letter was inadvertently mailed to Capital Sunbelt's old address and not to Sand Dollar, on October 28, 2002, our staff mailed a second letter to Sand Dollar attempting to collect all past due RAFs from that utility. We believe that any further attempts to collect would be futile because, in these instances, the utilities' corporate entities either no longer exist or are not subject to our regulation.

Therefore, show cause proceedings shall not be initiated against the aforementioned utilities for failure to pay RAFs. This matter shall be referred to the State Comptroller's Office, Department of Banking and Finance, for permission to write off these accounts as uncollectible.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the delinquent regulatory assessment fees and associated penalties and interest set forth in the body of this Order for the utilities named in the body of this Order shall be referred to the State Comptroller's Office, Department of Banking and Finance, for permission to write off the accounts as uncollectible. It is further

ORDERED that Weber Investment Corporation's and Sand Dollar Properties, Inc.'s failure to file annual reports for the years indicated in apparent violation of Rule 25-30.110(3), Florida Administrative Code, do not rise in these circumstances to the level of warranting the initiation of a show cause proceeding. It is further

ORDERED that we shall decline to order either Weber Investment Corporation or Sand Dollar Properties, Inc., to show cause, in writing within 21 days, why they should not be fined for their failure to timely pay regulatory assessment fees. It is further

ORDER NO. PSC-03-0018-FOF-SU
DOCKET NO. 021035-SU
PAGE 12

ORDERED that the penalties set forth in Rule 25-30.110(7), Florida Administrative Code, shall not be assessed, as the information contained in the delinquent reports is no longer needed for the ongoing regulation of these utilities. It is further

ORDERED that Weber Investment Corporation shall not be required to file its annual reports for the years 1993 through 1996. It is further

ORDERED that Sand Dollar Properties, Inc., shall not be required to file its 1996 annual report. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission this 3rd day of January, 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) 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.