

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-

DATE: November 20, 2015
TO: Carlotta Stauffer, Commission Clerk, Office of Commission Clerk
FROM: John Villafrate, Senior Attorney, Office of the General Counsel
RE: Docket Number 150012-WS - Application for transfer of Certificate 390-W from County-Wide Utility Co., Inc. to Southwest Ocala Utility, Inc. in Marion County.

Please place the attached correspondence from F. Marshall Deterding in the referenced docket file.

JEV/as
Attachment

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November 19, 2015

Ms. Amber Norris
Public Utilities Supervisor
Division of Accounting & Finance
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Application for Transfer of Certificate 390-W from County-Wide Utility
Co., Inc. to Southwest Ocala Utility, Inc. in Marion County
Docket No. 150012-WU

Dear Ms. Norris,

As a result of our meeting last week and our discussions approximately eight weeks ago in the above-referenced matter, we believe it necessary and appropriate that we forward to you a letter outlining some of our concerns with the staff's most recent position as expressed at our November meeting and the reasons why we believe those positions as taken by the staff are inappropriate under the facts of this case and under Commission rules and law.

As you will recall at the most recent meeting, we discussed the staff's desire to obtain information concerning the amount which was paid by the current owner for the mortgage debt which was subsequently foreclosed in order to obtain the utility assets. The staff is apparently now taking the position that the amount paid for the mortgage debt is relevant to the calculation of a potential acquisition adjustment for any difference between the amount paid for that debt and the net book value of the assets.

As you will recall, we had a lengthy discussion at the most recent meeting about the fact that the assets acquired as a result of the foreclosure are for the most part non-regulated assets at the time of such foreclosure. They are composed of (1) approximately \$82,000 in regulated utility assets; (2) approximately \$677,000 in a water transmission main that was specifically removed from rate base by the Public Service Commission in the utility's most

recent rate proceeding (and is therefore not a regulated asset); and (3) approximately \$267,000 in net book value for a sewer main that is not a regulated asset and may never become a regulated asset as it is not part of a regulated utility system. Therefore, the total of the assets acquired through foreclosure is approximately \$1 million in total which approximately 92% are non-regulated assets and approximately 8% are regulated assets.

In accordance with the information previously provided to the Commission staff, including a copy of the Court Order whereby the Circuit Court of Marion County granted the foreclosure, the value of the note relinquished in exchange for all of the various assets foreclosed was approximately \$1,007,000. That is per the Court's Order and includes the principal, interest and costs related to the foreclosure. If the Commission were to treat all the assets as regulated assets for the purposes of applying the acquisition adjustment, then the amount owed on the note is the number that should be compared to the net book value of the assets acquired.

Per the Commission's Rule 25-30.0371(1), acquisition adjustments are defined as:

“. . . the difference between the purchase price of utility system assets to an acquiring utility and the net book value of the utility assets”.

Since over 90% of the net book value of assets being acquired as a result of this foreclosure were not utility system assets, it is inappropriate for the Commission to attempt to apply an acquisition adjustment to the net book value of all of these assets. As such, the Commission rule on acquisition adjustments is clearly not applicable and attempts to allocate between regulated and non-regulated are not only subjective, but clearly outside of the rule.

In addition, an even more important issue that we had discussed in our first meeting approximately eight weeks ago, but which was not again discussed at this most recent meeting, is the fact that the Commission staff is attempting to utilize the price paid to transfer the mortgage note which was ultimately foreclosed rather than value of the assets. In this case, the assets acquired through foreclosure total approximately \$1 million.

We have reviewed all of the cases that we have been able to locate within the Commission's history involving foreclosure of mortgages on utility assets and,

in each of those cases, the amount that was bid for the acquisition of the utility assets is the figure which was compared to the net book value of the utility assets in order to apply the acquisition adjustment rule. In this case the amount bid was the \$200 minimum bid required by law.

The buyer only bid the minimum amount required by law in order to save on required doc stamps. The buyer could have bid the entire amount of the debt owed under the mortgage (approximately \$1,007,000.00) and acquired the assets in exchange for the mortgage that it already owned; however, that would have cost an additional approximately \$6,000 to \$7,000 in documentary stamps which would have only added to the purchase price paid by the buyers at the foreclosure serving no useful purpose other than possibly to inflate the net book value which in turn would have been passed through to the customer in rates. Since there were no other bidders, the buyers chose to bid \$200 cash simply to avoid paying these doc stamps. Clearly, this cannot form a reasonable basis for an attempt to apply an acquisition adjustment.

The Commission staff has requested that the buyer provide information concerning the amount paid to acquire the mortgage note from the bank which was ultimately foreclosed in order to acquire the utility assets. We have shown the staff that the buyer is not able to provide this information because the bank required a non-disclosure and confidentiality agreement to be part of the transaction between the buyer and the bank at the time of acquisition of that mortgage. In any case, the amount paid for the mortgage note is irrelevant to the issue of what was paid for the utility assets.

The Circuit Court Order clearly established what was paid for the Utility assets. The Commission does not have jurisdiction to ignore or to go behind the Court Order. The Commission has never done so in its history. In this case, because of the nature of the assets foreclosed, it is especially clear that such action by the Commission is not only outside their jurisdiction, but clearly inappropriate.

It should also be noted that if the original bank holding the mortgage note had undertaken this foreclosure, there would be no question from the Commission that the amount of the debt owed was the appropriate amount to be reviewed in comparison to the net book value and, as such, no acquisition adjustment would even have been suggested. The rate base of the utility should not hinge on who foreclosed the mortgage.

Therefore, we believe that the Commission cannot legally and should not ethically or procedurally be suggesting that an acquisition adjustment should be considered in this case. In fact, the difference between the assets given per the Court Order and the net book value of the assets acquired (even assuming they were all regulated utility assets) is so immaterial as to make an acquisition adjustment inappropriate. As such, the buyer has proposed to include the net book value of the utility assets as they are booked in rate base. To the extent the Commission is ready to recognize the value of the water transmission main (which provides the sole source of water for the utility and its customers) in the utility's rate base, we are in full agreement with such decision and the net book value of these assets should be recognized. However, this does not change the facts surrounding the foreclosure or the fact that those assets at the time of acquisition through foreclosure were not regulated utility assets.

We strongly urge the Commission staff to review these facts and circumstances and the attached Court Order and to propose a rate base that is keeping with not only the letter but the spirit of the provisions of the Commission's rule on acquisition adjustments and transfers and to provide the utility with a rate base without regard to any suggested acquisition adjustment.

Sincerely,



F. Marshall Deterding
Of Counsel

FMD/brf

Enclosure

cc: Mr. Dirk Leeward
Andrew Maurey
John Villafrate
Cheryl Bulecza-Banks
Bart Fletcher

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

DIRK J. LEEWARD and
DONNA G. LEEWARD,

Case No. 12-4792-CA-N

Plaintiffs,

v.

COUNTY-WIDE UTILITY CO. INC.,
a Florida Corporation; BAHIA OAKS, INC.,
a Florida Corporation; CITY OF OCALA,
a Florida municipal corporation,

Defendants.

FILED
CIVIL DIVISION
2013 MAR -4 P 4:16
DAVID R. ELLSPERMANN
CLERK CIRCUIT COURT
MARION COUNTY, FL

**SUMMARY FINAL JUDGMENT OF FORECLOSURE
AND FOR ATTORNEY'S FEES AND COSTS**

THIS ACTION having come before the Court upon the Plaintiffs' Motion for Summary Final Judgment of Foreclosure and for Attorney's Fees and Costs.

It is ADJUDGED that:

1. Proper service of process was perfected upon the Defendants herein.
2. There are no material issues of law or fact in this matter and Plaintiffs are entitled to a Summary Final Judgment of Foreclosure and for Attorney's Fees and Costs as to the Complaint filed herein as a matter of law.
3. Plaintiffs, DIRK J. LEEWARD and DONNA G. LEEWARD, whose address is 8492 Leeward Air Ranch Circle, Ocala, FL 34472, are due on the obligations sued hereunder.

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Principal		\$927,046.48
Interest to date of this judgment		\$67,738.46
Late fees		\$4,457.47
Title search expense		\$0.00
Taxes		\$0.00
Attorneys' fees		
Finding as to reasonable number of hours:		
Finding as to reasonable hourly rate:	15.55	
	\$350.00	
Attorneys' fees total		\$5,442.50
Court costs, now taxed		\$2,062.00
Appraisal Fee		\$0.00
Subtotal		\$1,001,987.66
LESS: Escrow balance		0.00
LESS: Other		0.00
TOTAL		\$1,006,746.91

that shall bear interest at the statutorily prescribed rate after the date hereof.

4. Plaintiffs hold a lien for the total sum superior to all claims or estates of the Defendants, COUNTY-WIDE UTILITY CO. INC.; BAHIA OAKS, INC.; and CITY OF OCALA, (other than as provided for in Paragraph 8) on the following described property in Marion County, Florida: **SEE COMPOSITE EXHIBIT 'A'**.
5. If the total sum with interest at the rate described in paragraph 3 above and all costs of this action accruing subsequent to this judgment are not paid, the Clerk of this Court shall sell the property at public sale to the highest bidder for cash, except as prescribed in paragraph 6, on April 8th, 2013, at 11:00 a.m., Eastern Standard Time (EST), at www.marion.realforeclose.com in accordance with Chapter 45, *Florida Statutes*.
6. Plaintiffs shall advance all subsequent costs of this action and shall be reimbursed for them by the Clerk if Plaintiffs are not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps

payable on the Certificate of Title. If Plaintiffs are the purchaser, the Clerk shall credit Plaintiffs' bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it as is necessary to pay the bid in full.

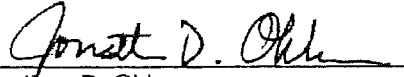
7. On filing the Certificate of Title, the Clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of Plaintiffs' costs; second, documentary stamps affixed to the certificate; third, Plaintiffs' attorneys' fees; fourth, the total sum due to Plaintiffs, less the items paid, plus interest at the rate prescribed in paragraph 3 from this date to the date of the sale; and by retaining any remaining amount pending the further order of this Court.
8. On filing the Certificate of Sale, Defendants, COUNTY-WIDE UTILITY CO. INC., CITY OF OCALA and BAHIA OAKS, INC., and all other parties claiming through them since the filing of the Notice of Lis Pendens, shall be foreclosed of all estate or claim in the property except as to rights of the CITY OF OCALA pursuant to the Bulk Water and Waste Water Agreement dated September 5, 2003, as amended on August 2, 2004. Upon the filing of the Certificate of Title, the person named on the Certificate of Title shall be let into possession of the property. If Defendant, COUNTY-WIDE UTILITY CO., INC., remains in possession of the property, the Clerk shall without further order of the Court issue forthwith a Writ of Possession upon request of the person named on the Certificate of Title.
9. Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, a deficiency judgment.
- 10.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THIS FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

ORDERED in Chambers in Ocala, Marion County, Florida this 4 day of March,

2013.



Jonathan D. Ohlman
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a true and accurate copy of the foregoing SUMMARY FINAL JUDGMENT OF FORECLOSURE AND FOR ATTORNEYS' FEES AND COSTS by U.S. Mail, postage prepaid, this 5th day of March 2013, to the following:

Bryce W. Ackerman
125 NE First Avenue, Suite 1
Ocala, FL 34470


Attorney for Plaintiff

W. James Gooding
15313 SE 36 Avenue
Ocala, FL 34471

Attorneys for Defendant,
City of Ocala

Lawrence C. Callaway, III
333 NW 3 Avenue
Ocala, FL 34475

Attorney for Defendants,
County-Wide Utility Co., Inc.
and Bahia Oaks, Inc.

By: 
Deputy Clerk/Judicial Assistant