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: March 1, 2007

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Jaeger)
Division of Economic Regulation (Hudson, Bulecza-Banks, Rendell)

RE: Docket No. 060406-SU – Application for staff-assisted rate case in Polk County by Crooked Lake Park Sewerage Company.

AGENDA: 03/13/07 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060406.RCM.DOC

Case Background

On December 13, 1957, Polk County granted a franchise to Park Water Company to operate a water and wastewater system. In 1978, the wastewater treatment plant and collection system were sold to Warner Southern College and the name was changed to Crooked Lake Park Sewer Company. The current owner purchased this utility on September 30, 1988, under the name Crooked Lake Park Sewerage Company (Crooked Lake or the utility). Polk County came under the Commission's jurisdiction on July 11, 1996.

Crooked Lake is a Class C wastewater utility serving 423 wastewater customers in Polk County. According to the utility's 2005 Annual Report, total gross revenue was $104,313, and total operating expenses were $167,266 (for a loss of $62,953). The utility previously filed for a staff-assisted rate case (SARC) on September 6, 2005. However, due to the health of the utility's

owner, the utility's books and records had not been updated through the end of the test year. Therefore, the books could not be audited by Commission staff. By Order No. PSC-06-0337-PAA-SU, issued April 24, 2006, in Docket No. 050586-SU, In re: Application for staff-assisted rate case in Polk County by Crooked Lake Park Sewerage Company, the docket was closed and the filing fee of $1,000 was not refunded. The order also indicated that once the utility owner was prepared to assist staff with the processing of a subsequent rate case request, he could resubmit an application for a new staff assisted rate case.

On May 19, 2006, the Commission received Crooked Lake's new application for a SARC. The official date of filing was established as July 16, 2006. To ensure that the Commission could issue a final order setting rates within 15 months of the official date of filing as required by Section 367.0814(2), Florida Statutes (F.S.), staff filed its proposed agency action recommendation on December 27, 2006. In that recommendation, among all the issues for setting final rates and charges, staff also identified a show cause issue addressing the utility's apparent failure to comply with some requirements of Order No. PSC-99-2116-PAA-SU (First PAA Order).[1] The Commission voted on all issues, except the show cause issue, and directed staff to bring that issue back at a later date with further clarification. Order No. PSC-07-0077-PAA-SU (Second PAA Order), memorializing the Commission's decision, was issued on January 29, 2007.

This recommendation addresses the show cause issue, and the Commission has the authority to consider the show cause issue pursuant to Sections 367.0814, 367.161, and 367.111, Florida Statutes (F.S.).

[1] Order No. PSC-99-2116-PAA-SU, issued October 25, 1999, in Docket No. 980778-SU, In re: Application for staff-assisted rate case in Polk County by Crooked Lake Park Sewerage Company.

Discussion of Issues

Issue 1: Should Crooked Lake Park Sewerage Company be ordered to show cause in writing, within 21 days, why it should not be fined for its apparent failure to comply with the requirements of Order No. PSC-99-2116-PAA-SU, issued October 25, 1999, to satisfy the violations listed by the Department of Environmental Protection in its Warning Letter No. WL980009DW53SWD, dated March 25, 1998?

Recommendation: Yes. Crooked Lake Park Sewerage Company should be ordered to show cause in writing, within 21 days, why it should not be fined $500 for its apparent failure to comply with the requirements of Order No. PSC-99-2116-PAA-SU. The order to show cause should incorporate the conditions stated below in the staff analysis. (Jaeger, Hudson, Rendell)

Staff Analysis: Pursuant to the First PAA Order, the Commission noted that the Department of Environmental Protection (DEP) in its Warning Letter No. WL980009DW53SWD, dated March 25, 1998, had cited the utility for the following violations:

A) Effluent being discharged off utility property;

B) Failure to use its south percolation pond;

C) Overflow of raw wastewater from plant tanks;

D) Failure to report its discharge violations to the DEP; and

E) Influent flows exceeding permitted capacity.

The First PAA Order was especially concerned with the discharge of effluent into Crooked Lake, and, at p. 7, specifically stated: "The utility must make DEP mandated improvements."

The First PAA Order further noted that the violations were probably attributable to the utility's infiltration problems, and the Commission approved what it considered sufficient pro forma plant allowance to correct the infiltration problem, and reired the pro forma improvements be completed within 180 days. Commission staff verified that the pro forma improvements were made within the time allowed, and the docket was closed. Since the time that the First PAA Order was issued, staff was not aware of any further discharges off the utility's property until it started its investigations for this current staff assisted rate case.

As stated in the Quality of Service section of staff's SARC recommendation filed December 27, 2006, a DEP inspector on January 27, 2006, discovered "a gravity hose extending out of the chlorine contact chamber discharging wastewater" such that it entered Crooked Lake in violation of DEP rules. (This violation was not noted in a prior inspection conducted on January 6, 2006). The utility immediately corrected this violation. Although it was immediately corrected, the violation appeared to be identical to the violation noted in the First PAA Order. Therefore, some seven years after the First PAA Order, it appears to staff that DEP is again citing the utility for a problem with discharge to Crooked Lake.

When there are apparent violations of DEP rules, the Commission works with DEP, and DEP brings whatever enforcement action it deems appropriate. Staff has been in close contact with DEP, and has advised DEP of the customer concerns expressed at the customer meeting. DEP is primarily responsible for enforcement of Chapter 403 (entitled Environmental Control), F.S., and the Commission usually defers to DEP's interpretation of that Chapter. However, in the First PAA Order, the Commission specifically noted this same problem with discharge of effluent to Crooked Lake, and provided for pro forma improvements designed to correct this problem.

As stated in the First PAA Order, the problems with discharge of effluent off utility premises were at that time attributed in large part to excessive infiltration and inflow. The pro forma improvements approved by the First PAA Order and completed by the utility within 180 days of that Order were for the purpose of preventing any further discharge, and, at first, seemed to be successful. However, based on DEP's Notice of Violation, the utility is again discharging effluent into Crooked Lake. Staff has no indication that the discharge activity has been continuous since the First PAA Order was issued on October 25, 1999, and, the discharge activity appears to have been immediately corrected when it was discovered on January 27, 2006.

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). Section 367.161(1), Florida Statutes, authorizes the Commission 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 provision of Chapter 367, Florida Statutes, or any lawful order of the Commission. Section 367.161(1), F.S., further provides:

> However, any penalty assessed by the commission for a violation of s. 367.111(2), shall be reduced by any penalty assessed by any other state agency for the same violation. Each day that such refusal or violation continues constitutes a separate offense.

Section 367.111(2) addresses quality of service, and requires the utility to:

> provide to each person reasonably entitled thereto such safe, efficient, and sufficient service as is prescribed by part VI of Chapter 403 and parts I and II of chapter 373, or rules adopted pursuant thereto.

By again discharging wastewater off the utility premises and into Crooked Lake, staff believes that the utility has failed to comply with the intent and above-noted requirements of the First PAA Order. This act of discharging effluent off utility property, and failing to report such discharges would appear to be "willful" in the sense intended by Section 367.161, Florida Statutes. In Commission 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 show cause proceedings are warranted. Staff is especially concerned with the re-occurrence of discharge of effluent into Crooked Lake.

By letter dated January 26, 2007, the owner of the utility responded to the concerns that had been expressed by staff in the December 27, 2006 SARC recommendation. In that letter, the owner stated that the utility had spent $150,000 to repair sewer lines, manholes, and to rework land around the percolation ponds. The owner also stated that the utility had been beset upon by Hurricanes Charlie, Francis and Jeanne, and that had caused Crooked Lake to rise to record levels. Because of the flooding from the rise of Crooked Lake, the owner stated:

> [T]he sewer company worked 7 days a week and some nights to keep up the sewer system for the 187 homes. We used tanker trucks and pumps to move the influent to other plants or lift stations. We worked for 3 months before the problem got improved. We had no help from Polk County or anyone.

During the time after Hurricane Charlie, the owner stated that the utility spent "80,000 dollars more than it received in income," and that "there has not been any payroll to any person issued by Crooked Lake." A report from Pickett Engineering, Inc. appears to confirm the problems the utility had with flooding, and states: "In spite of the flooding conditions, the owner maintained the treatment of the raw sewage by the plant but the flow volume resulted in discharges of treated effluent from the disposal ponds." Pickett Engineering, Inc. concluded that "as of May 31, 2006, the level of Crooked Lake has receded to the point where the plant can now properly operate."

Although staff sympathizes with the problems the utility has faced, staff believes that the continued pattern of disregard for the Commission's Orders (and DEP rules) warrants more than just a warning. Accordingly, staff recommends that Crooked Lake be made to show cause in writing, within 21 days, why it should not be fined $500 for its apparent failure to comply with the requirements of the First PAA Order to cease discharging effluent off its property and into areas such that it enters Crooked Lake.

Staff believes the $500 penalty, coupled with the 50% annual reduction in salary ($12,000 per year that the Commission ordered in the Second PAA Order) is typical of utilities of this size, and with similar violations. The annual reduction in salary of $12,000 will continue until the utility demonstrates in a future rate proceeding that the management of the utility has improved such that a higher salary is warranted. Also, because DEP is pursuing its own complaint against the utility and seeking what appears to be over $360,000 in fines and penalties, staff believes that the DEP proceedings for the Chapter 403 violations are adequate.

Finally, the Commission procedures for setting a proposed fine amount were put in place to promote the best use of both utility and Commission resources. In many instances, a utility may choose not to contest a fine if the fine falls below a certain amount. Also, because fines imposed by this Commission might be offset by fines imposed by DEP (see previously cited Section 367.161(1), F.S.), staff believes it would be inefficient for DEP and this Commission to

conduct what would be basically parallel proceedings. Staff believes that a separate proceeding brought by this Commission might divert what limited resources the utility has from correcting the problems it faces. As stated earlier, where there are violations of Chapter 403, F.S., it has been Commission practice to work closely with DEP, but to let DEP take the lead in determining what the exact violations are and the appropriate fine. Staff believes that the resources of the Commission, DEP, and the utility can be better utilized without necessarily opening another proceeding.

Based on the above, staff recommends that the show cause order incorporate the following conditions:

1. The utility's response to the show cause order should contain specific allegations of fact and law;

2. Should Crooked Lake file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made;

3. A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;

4. In the event that Crooked Lake fails to file a timely response to the show cause order, the fine should be deemed assessed with no further action required by the Commission;

5. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order; and

6. If the utility responds to the show cause order by remitting the fine, this show cause matter should be considered resolved

Although payment of the fine would resolve this show cause proceeding, nothing would prevent the Commission from again initiating show cause proceedings if it was discovered that the utility was again improperly discharging effluent into Crooked Lake.

Further, the utility should be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to $5,000 per day per violation for each day the violation continues as set forth in Section 367.161, F.S.

Issue 2: Should this docket be closed?

Recommendation: If Crooked Lake pays the $500 fine, the docket should be closed administratively. If the utility timely responds in writing to the Order to show cause, the docket should remain open to allow for the appropriate processing of the response. (Jaeger)

Staff Analysis: If Crooked Lake pays the $500 fine, the docket should be closed administratively. If the utility timely responds in writing to the Order to show cause, the docket should remain open to allow for the appropriate processing of the response.