

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: December 6, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Kaproth)
Office of the General Counsel (Jaeger)

RE: Docket No. 070580-WU – Initiation of Show Cause Proceedings against Kincaid Hills Water Company in Alachua County for violation of Rule 25-30.110, F.A.C., Records and Reports; Annual Reports; Rule 25-30.120, F.A.C., Regulatory Assessment Fees; Water and Wastewater Utilities; and of Order PSC-04-0615-FOF-WU.

AGENDA: 12/18/07 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\070580.RCM.DOC

Case Background

Kincaid Hills Water Company (Kincaid or utility) is a Class C water utility located in Alachua County serving approximately 338 customers. According to the utility's 2006 Annual Report, total gross revenue was \$49,942 for the year, with an indicated net operating loss of \$9,140. Kincaid became subject to Commission jurisdiction and was granted a certificate of operation by Order No. PSC-93-1027-FOF-WU.¹

¹ Order issued July 13, 1993, in Docket No. 921195-WU, In re: Application for certificate to provide water service in Alachua County under grandfather rights by Kincaid Hills Water Company.

Since coming under the Commission's jurisdiction, Kincaid has only filed one annual report on time (1997) and has not timely paid its regulatory assessment fees (RAFs). Part of Kincaid's failure to pay regulatory assessment fees stems from the company's failure to have a rate increase in over 15 years and its non-compensatory rates. Kincaid applied twice for staff assisted rate cases, but the utility subsequently withdrew each request. Kincaid apparently withdrew each request upon being advised by staff that it appeared to staff that Kincaid did not meet the criteria set forth in Rule 25-30.455(8), Florida Administrative Code (F.A.C.), to qualify for staff assistance. According to Rule 25-30.455(8), F.A.C., in arriving at a recommendation on whether to grant staff assistance, staff is to consider, among other things, whether the utility has filed annual reports, has paid applicable RAFs, and has made a good faith effort to comply with all Commission decisions for the two-year period prior to the receipt of the application. Therefore, this small utility has never had a staff-assisted rate case.

Moreover, until this year, the utility had never availed itself of any price-index or pass-through increases. After much assistance from staff, the utility received a combined price index (a 2.74 percent increase for certain expenses incurred in 2006) and a pass-through increase (a 4.5 percent increase on gross revenues in 2006 to account for the RAFs) on June 1, 2007. Therefore, for 15 years, the utility did not have the cost of the RAFs built into its rates. Even with the increase on June 1, 2007, the utility's base facility charge (BFC) for the standard meter for residential service was only \$6.84, and the gallonage charge for each 1,000 gallons was \$.91. For the 2007 Price Index, which went into effect on October 2, 2007, the BFC increased by \$.10 to \$6.94, and the gallonage charge increased by only \$.01 to \$.92 for each 1,000 gallons. These two increases were the first increases Kincaid received in 15 years.

The following is a chronology of the utility's failure to timely file its annual reports and failure to pay its RAFs.

1995-1996 Annual Reports

By Order No. PSC-98-0737-SC-WU,² the Commission ordered Kincaid to show cause for failure to timely file its 1995 and 1996 annual reports and pay associated penalties.³ Kincaid failed to respond to the show cause order and penalties of \$2,628 were deemed assessed. After two collection efforts, the docket was closed upon the Office of Comptroller granting the Commission permission to write off uncollected claims totaling \$2,628.

1998-2003 Annual Reports and 1995-2003 RAFs

The utility also failed to timely file its annual reports for 1998-2003, and failed to pay its 1995-2003 RAFs. By Order No. PSC-04-0615-FOF-WU, issued June 21, 2004,⁴ and based, in

² Order issued May 28, 1998, in Docket No. 971623-WU, In re: Initiation of show cause proceedings against Kincaid Hills Water Company in Alachua County for violation of Rule 25-30.110(3), F.A.C., Records and Reports; Annual Reports.

³ Rule 25-30.110(3), Florida Administrative Code, requires utilities subject to Commission jurisdiction as of December 31 of each year to file an annual report on or before March 31 of the following year.

⁴ Order issued in Docket No. 040248-WU, In re: Initiation of show cause proceedings against Kincaid Hill Water Company in Alachua County for violation of Rule 25-30.110, F.A.C., Records and Reports; Annual Reports, and Rule 25-30.120, F.A.C., Regulatory Assessment Fees; Water and Wastewater Utilities.

part, on the utility's cooperation, the Commission chose not to assess the penalties for the delinquent annual reports.⁵ As for the utility's failure to pay the 1995-2003 RAFs, the Commission found that the utility owed \$29,231.42 as of June 30, 2004.

Upon request of the utility, the Commission, in Order No. PSC-04-0615-FOF-WU (hereinafter Settlement/Pay-Plan Order), approved an offer of settlement, whereby the utility proposed a payment plan for the utility's outstanding RAFs and associated penalties and interest. Pursuant to that plan, the utility was to pay \$3,000 on June 20, 2004, and continue to pay \$500 per month by the 20th of each following month until the full amount of \$29,231.42 was paid. In the Settlement/Pay-Plan Order, the Commission further noted that it was not then ordering the utility to show cause, but that if the utility failed to make the required monthly installments by the due date of any month, "further enforcement of the payment plan will be initiated, such as placement of a lien on the utility's real and personal property."

The utility paid \$3,000 on June 24, 2004, and paid an additional \$9,000, for a total of \$12,000, through January 4, 2006,⁶ but then ceased all payments. Of the total \$12,000 paid, \$10,903.86 was applied to RAFs and \$1,096.14 was applied to penalty and interest. This had the effect of completely paying off the RAFs for 1995 through 1999, with \$1,410.92 of the \$1,808.33 RAFs for the year 2000 also being paid.

2004-2006 Annual Reports and RAFS

Subsequent to the Settlement/Pay-Plan Order, issued in June 2004, the utility filed its 2004 Annual Report on August 4, 2005 (due date had been extended until May 2, 2005 -- so the report was 94 days late), the 2005 Annual Report was not filed until October 24, 2006 (207 days late), and the 2006 Annual Report was not filed until July 30, 2007 (121 days late).

Pursuant to the 2004, 2005, and 2006 Annual Reports, the RAFs due were \$2,076.17, \$2,148.84, and \$2,247.39, respectively. The utility paid the 2006 RAFs on August 28, 2007, approximately five months late. The utility paid the 2004 RAFs and all but \$225.01 of the 2005 RAFs on November 26, 2007. The payment plan did not address payment of RAFs for the years after 2003.

Staff has written multiple letters and made numerous telephone calls concerning the failure of the utility to comply with the payment plan, failure to pay subsequent RAFs for the years 2004, 2005, and 2006, and for failure to timely file its 2004, 2005, and 2006 Annual Reports (all of which are now filed). During the last telephone calls in August 2007, Mr. Knowles, President of Kincaid, indicated that he would pay the 2006 RAFs by the end of August (which he did), and that he would get back on the \$500 payment plan at the end of September.

⁵ The Commission calculated that the penalty for the late filing of these annual reports could have been \$9,879 if the standard \$3 penalty authorized by Rule 25-30.110(7)(b), F.A.C., was assessed. Pursuant to Rules 25-30.110(6) and (7), F.A.C., absent good cause shown for noncompliance, the standard penalty is \$3 per day late for a Class C utility.

⁶ The utility submitted payments as follows: \$3,000 on June 24, 2004; \$500 on July 28, 2004; \$3,000 on March 1, 2005; \$2,500 on June 23, 2005; and \$3,000 on January 4, 2006. The utility also submitted a check, Check No. 5724, on October 7, 2004, for \$500, but that check was returned for insufficient funds.

Although Mr. Knowles did not get back on the payment plan, he did submit a check for \$4,000 on November 26, 2007.

Summary of Annual Reports and RAFs

Out of the \$29,231.42 found to be due for the 1995-2003 RAFs as of June 30, 2004, the utility has paid \$12,000. Although the utility has now paid the RAFs of \$2,247.39 for 2006 as of August 28, 2007, and the RAFs for 2004 (\$2,076.17) and all but approximately \$225 of the RAFs for 2005 (\$1,923.83 applied to the 2005 RAFS) as of November 26, 2007, it has not paid the statutory penalty or interest. With the remaining RAFs due for 2005, plus the statutory penalty and interest for the years 2004-2006, staff calculates the total remaining amount due for the years 2004-2006, as of December 31, 2007, to be \$2,945.88. Finally, pursuant to Rule 25-30.110(7), F.A.C., the utility is subject to a penalty of \$1,266 for the late filing of its 2004, 2005, and 2006 Annual Reports.

DEP Compliance

In addition to Kincaid's lack of compliance with the Commission's requirements, Kincaid also failed to comply with the Department of Environmental Protection's (DEP's) requirements. Staff notes that the Settlement/Pay-Plan Order addressed DEP's issues with Kincaid:

Commission staff learned that the Florida Department of Environmental Protection (DEP) issued a Final Order to Kincaid on April 24, 2003, requiring specific corrective actions to redress the alleged violations of DEP rules and statutes, including bacterial and chemical analyses and physical improvements to the water plant. Kincaid was ordered to pay an \$8,000 fine to DEP in the Final Order. According to DEP staff, Kincaid failed to fully comply with the corrective actions described above or pay the fine. DEP is currently seeking enforcement of the Final Order.

Staff checked with DEP and was informed that DEP has turned over environmental enforcement action to the federal Environmental Protection Agency (EPA). However in the DEP's December 26, 2006 Inspection Report, staff notes that the report described the following violations: the standby generator was still not working; the utility had failed to maintain the minimum 0.2 ppm [parts per million] of chlorine residual; and the utility did not have a Chlorine Test Kit and On-Site Logs available during the inspection. Staff also contacted the EPA, and was advised that the utility was having problems with complying with the monitoring requirements for: (1) Total Coliform Bacteria, (2) Total Trihalomethanes and Five Halo Acids, (3) Primary Inorganic Chemicals, and (4) Nitrates. However, EPA advised staff that it appeared that the utility was coming into compliance, and that EPA was continuing to work with the utility.

On November 6, 2007, DEP conducted a Sanitary Survey at the Kincaid Hills water treatment plant. By letter dated November 20, 2007, DEP advised Mr. Knowles of the result of that survey and transmitted a copy of the Sanitary Survey Report. In the letter, in addition to

noting that the utility had only paid \$1,800 on an \$8,250 fine, the following deficiencies were noted:

1. Utility had failed to repair or replace the auxiliary power generator which was required by Amended Final Order, OGC # 00-0211, dated July 31, 2003, and is also required by Rule 62-555.320(14), F.A.C.;
2. One of the two hydropneumatic tanks was still leaking in apparent violation of Rule 62-555.350, F.A.C. (rule requires all components to be maintained in good operating condition);⁷
3. No Monthly Operating Reports have been received since July 1997, and the facility has failed to provide proper certified operator coverage during the last years, or maintain the required Operating/Maintenance Log on site as required by Rules 62-550.730(1)(d) and 62-602.560, F.A.C. The letter noted that Mr. Knowles had renewed his operating license on August 2007, and that an operating log on loose paper (supposed to be in a bound book) was available for the months of August-October 2007;
4. Facility had failed to provide the Consumer Confidence Report to its customers by July 1, 2007, and did not provide DEP with the certification of Delivery by August 10, 2007 in violation of Rules 62-550.824, F.A.C., and Rule 40 CFR 141, Subpart O. The DEP noted that EPA was enforcing this violation;
5. Some areas in the wells, tanks, piping, etc., showed signs of corrosion and needed sanding and painting. This was an apparent failure to maintain the system in good condition as required by Rule 62-555.350, F.A.C.;
6. The following microbiological monitoring violations occurred in 2007: (1) No bacteriological monitoring analysis results were submitted for the month of January 2007 in violation of Rule 62-550.518(1), F.A.C., and no public notice was issued for this violation; (2) Facility exceeded the average maximum contaminant level (MCL) for total coliform bacteria during the month of September 2007 because it had two positive analyses in the distribution system during this month in violation of Rule 62-550.310(50), F.A.C. No public notice was issued for this violation; and (3) No repeat analyses were performed for the two positive samples in September as required by Rule 62-518(7)(b), F.A.C.;
7. The chemical analysis results for cadmium, dalopon, and dichloromethane for a sample collected on 12/21/06 indicated that cadmium level was 0.014ug/L, which was greater than the MCL level of 0.005, and that dalopon (1.0 ug/L and dichloromethane (0.72 ug/L) were detected. These results were forwarded to DEP by EPA, but no quarterly monitoring analyses was received from the

⁷ Mr. Knowles had advised DEP that this tank was taken out of service in June 2007, and that there were no plans to use it again; however, this tank was leaking during the inspection.

utility as required by Rules 62.550.513(2), 62-550.516(4)), and 62-550.515(3), F.A.C.;

8. DEP had not received the required chemical monitoring analyses for Disinfection By-products and Lead & Copper due for 2007, and the utility was asked to submit the results by December 31, 2007; and
9. DEP did not have a copy of the Bacteriological Sampling Plan, the Disinfection By-Products Monitoring Plan, or the written Cross-Connection Control (CCC) Plan. DEP requested the utility to either submit a copy of these plans or prepare the plans using the enclosed plan forms and examples. DEP stressed the importance of following these plans for the monitoring of these contaminants and that the CCC Plan is a requirement for all community water systems to prevent contamination by prohibited cross-connections.

DEP noted that the chlorine residual and pressure were satisfactory. However, for the above-noted deficiencies, DEP requested the utility to provide a response within 20 days of receipt of the letter detailing how all deficiencies will be corrected in a satisfactory manner.

Actions Taken to Obtain Compliance With Commission Rules

Over the years, staff has made numerous telephone calls and sent many letters, both certified and uncertified, to attempt to have Kincaid comply with the Commission's rules and orders. While Kincaid has now filed all of its annual reports, the company has not satisfied its regulatory assessment fee obligations. Because the utility went from 1995-2003 without paying RAFs and because of its size and limited revenues and resources, staff does not believe that the utility will ever be able to make up the RAFs, plus penalties and interest, for those years.⁸ However, the utility has indicated that it could pay the RAFs for the years 2004-2006.⁹ Staff believes that for the utility to even pay the remaining RAFs, plus penalty and interest, for the years 2004-2006, plus any subsequent RAFs continuing to accrue, the utility would need a staff assisted rate case.

Staff has been actively monitoring actions taken by the DEP and the EPA, as actions taken by these regulatory bodies could cause Kincaid to abandon its system. Kincaid has been fined by DEP for failure to comply with DEP's rules and regulations. Kincaid did pay \$1,800 toward its \$8,250 fine, but still owes DEP \$6,450. Over the past months, staff has been monitoring DEP's action to see whether additional fines would be assessed that would place Kincaid in a position whereby it would be unable to operate as a going concern. Even though DEP was unable to gain Kincaid's compliance, DEP has not assessed additional fines. In lieu of assessing additional fines, DEP turned the case over to the EPA. Once the case was transferred to the EPA, staff was informed that if Kincaid failed to comply with its testing and operational obligations, EPA would impose a significant fine that would possibly force Kincaid to sell or

⁸ The utility paid \$12,000 starting in June 2004 through January 2006.

⁹ The utility has paid \$6,247.39 on RAFs due of \$6,472.40, for a remaining amount of RAFs due of \$225.01 for the years 2004-2006. This amount does not include any statutory penalty or interest.

abandon its system. Based on actions taken by Kincaid to achieve compliance, it appears that EPA will not be assessing any fines. EPA continues to monitor Kincaid for compliance.

Staff has been in discussions with Alachua County regarding possible actions that would be required should Kincaid be unable to meet the compliance requirements of the DEP, EPA, and the Commission. During these discussions, staff discovered there are difficulties in identifying potential successors to take over the utility. The likely candidate would be Gainesville Regional Authority (GRU). However, due to the potential financial obligation to upgrade the distribution system and extend a supply main, GRU has indicated it is not interested in pursuing receivership or ownership. The county, likewise, is not interested, but is aware of its statutory obligations under Section 367.165, Florida Statutes (F.S.), should an abandonment take place. Similarly, staff is aware that one of the larger investor-owned water and wastewater utilities in Florida has shown some interest in a purchase. However, the owner of Kincaid established a selling price that the potential buyer believed to be excessive, considering the condition of the utility. Over the past months, staff has been evaluating the Kincaid situation to determine an appropriate course of action, pending actions taken by other regulatory bodies. Currently, Kincaid is continuing to operate its water system.

This recommendation addresses the utility's failure to timely file its 2004-2006 annual reports, its failure to timely submit its 2004-2006 RAFs, its failure to comply with the payment plan set forth in the Settlement/Pay-Plan Order, and the actions to be taken to encourage payment of future RAFs. The Commission has jurisdiction pursuant to Sections 350.113, 367.081, 367.0814, 367.145, and 367.161, F.S.

Discussion of Issues

Issue 1: What action should the Commission take for the failure of Kincaid Hills Water Company to pay \$500 per month as set forth in the payment plan in Order No. PSC-04-0615-FOF-WU?

Recommendation: Because the utility has not complied with the payment plan, the remaining amount of regulatory assessment fees, plus appropriate penalty and interest, for the years 1995 through 2003, which is calculated to be \$21,220.41 through December 31, 2007, should be submitted to the Division of Accounting and Auditing of the Department of Financial Services for further collection efforts or for permission to write off the account as uncollectible. (Kaproth, Jaeger)

Staff Analysis: Pursuant to Order No. PSC-04-0615-FOF-WU (Settlement/Pay-Plan Order), issued June 21, 2004, the utility agreed to pay off the total amount due at that time of \$29,231.42 for its failure to remit RAFs for the years 1995 through 2003. The \$29,231.42 consisted of RAFs of \$16,954.53, statutory penalties of \$4,050.51, and interest of \$8,227.34.¹⁰

Pursuant to that Order, the utility was to pay \$3,000 in June 2004, and then \$500 per month thereafter until the full amount was paid off. The utility paid \$3,000 on June 24, 2004, and through January 4, 2006, paid an additional \$9,000, but then ceased payments. As of the date of the filing of this recommendation, the payment plan called for the utility to have made installment payments of \$24,000, and only \$12,000 had been paid in, leaving a total balance due of \$17,231.42,¹¹ plus any appropriate interest due which accrued subsequent to June 2004.¹² By numerous letters sent by certified mail, staff has attempted to have the utility comply with the payment plan.¹³ However, as of the date of the filing of this recommendation, the only payment the utility has made since January 2006 was for the 2006 RAFs in the amount of \$2,247.39, on August 28, 2007, and another \$4,000 on November 26, 2007. These payments were for the 2004-2006 RAFs and were not made as a part of the Payment Plan. Therefore, the utility is in violation of the Settlement/Pay-Plan Order. The full remaining amount due is calculated to be \$21,220.41, which represents the appropriate regulatory assessment fees, plus the statutory penalty (\$3,763.58 for the statutory penalty),¹⁴ and interest, pursuant to Sections 350.113 and 367.145, F.S., and Rule 25-30.120, Florida Administrative Code, for the years 1995 through 2003, with interest being calculated through December 31, 2007. The calculations are as follows:

¹⁰ Interest amount was calculated through the month of June 2004.

¹¹ This amount only includes interest through June 2004. Staff has recalculated the amount due to include interest through December 2007.

¹² Although the utility has paid in an additional \$6,247.39 since January 2006, these payments were all applied to the RAFs for 2004-2006.

¹³ Letters were dated September 28, 2004, January 5, 2005, May 26, 2005, November 29, 2005, June 9, 2006, August 10, 2006, and October 10, 2007.

¹⁴ For 1995, the utility paid the penalty of \$475.97.

| Year | Revenues | Regulatory Assessment Fees | Penalty | Interest | Total as of 12/31/07 |
|--------------|------------------|---|-------------------|--------------------|-------------------------------------|
| 1995 | \$42,308 | 00.00 | \$00.00 | \$1,302.73 | \$1,302.73 |
| 1996 | \$42,705 | 00.00 | \$480.43 | \$1,729.56 | \$2,209.99 |
| 1997 | \$41,886 | 00.00 | \$471.22 | \$1,507.90 | \$1,979.12 |
| 1998 | \$41,745 | 00.00 | \$469.63 | \$1,427.68 | \$1,897.31 |
| 1999 | \$42,310 | 00.00 | \$475.99 | \$1,218.53 | \$1,694.52 |
| 2000 | \$40,185 | \$397.41 | \$452.99 | \$1,052.80 | \$1,902.29 |
| 2001 | \$42,220 | \$1,899.90 | \$474.98 | \$1,291.93 | \$3,666.81 |
| 2002 | \$41,400 | \$1,863.00 | \$465.75 | \$1,043.28 | \$3,372.03 |
| 2003 | \$42,008 | \$1,890.36 | \$472.59 | \$831.75 | \$3,194.70 |
| Total | \$376,767 | \$6,050.67 | \$3,763.58 | \$11,406.16 | \$21,220.41 |

In the Settlement/Pay-Plan Order, the Commission stated: "If the utility fails to make the required monthly installments by the due date of any month, further enforcement of the payment plan will be initiated, such as placement of a lien on the utility's real and personal property." Staff, however, believes that the Commission should not expend any further collection efforts or pursue a lien.

Because the utility has not complied with the payment plan and because the Commission and staff have already made extensive efforts to have the utility come into compliance, staff recommends that the remaining amount of regulatory assessment fees, plus appropriate penalty and interest, for the years 1995 through 2003 should be submitted to the Division of Accounting and Auditing of the Department of Financial Services (Financial Services) for further collection efforts or for permission to write-off the account as uncollectible. Staff notes that it has been advised by Financial Services that they have employed a new collection agency. For administrative efficiency reasons, staff believes that this new collection agency is much better suited for collecting the \$21,220.41.

Section 367.145(1)(b), F.S., also provides that "in addition to the penalties and interest otherwise provided, the commission may impose a penalty upon a utility for failure to pay regulatory assessment fees in a timely manner in accordance with s. 367.161." Section 367.161(1), F.S., 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, F.S., or any lawful rule or order of the Commission. 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). By failing to comply with the above-noted requirements of the Settlement/Pay-Plan Order and also Sections 350.113 and 367.145, F.S., and Rule 25-30.120, F.A.C., the utility's acts are "willful" in the sense intended by Section 367.161, F.S. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, 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.

In this docket, staff believes that there is a continued pattern of disregard for the directions, orders, and rules of this Commission, and, in particular, the Settlement/Pay-Plan Order. However, staff believes there are exigent and mitigating circumstances.

From the time the utility came under the Commission's jurisdiction in June of 1992 to June 1, 2007, this utility has never had a rate increase, and, in 2006, reported a net operating loss of \$9,140. On June 1, 2007, the utility received a combined price index (a 2.74 percent increase for certain expenses incurred in 2006) and a pass-through increase (a 4.5 percent increase on gross revenues in 2006 to account for the RAFs). Therefore, for 15 years the utility did not have the cost of the RAFs built into its rates. Even with the increase on June 1, 2007, the utility's base facility charge (BFC) for the standard meter for residential service was only \$6.84, and the gallonage charge for each 1,000 gallons was \$.91. For the 2007 price index, which went into effect on October 2, 2007, the base facility charge (BFC) increased by \$.10 to \$6.94, and the gallonage charge increased by only \$.01 to \$.92 for each 1,000 gallons.

Pursuant to the utility's 2006 Annual Report, out of total revenues of \$49,942, the utility experienced a net operating loss of \$9,140. This was based on depreciation expense of \$19,467, operations and maintenance expenses of \$34,068, and taxes other than income taxes of \$5,547, for total expenses of \$59,082. Staff has reviewed the 2006 Annual report, but an audit has not been conducted.

As noted in the Case Background, the utility applied for two staff assisted rate cases. Rule 25-30.455(8), F.A.C., sets out the criteria that the Division of Economic Regulation (ECR) must consider in deciding whether to grant staff assistance. In considering Rule 25-30.455(8), F.A.C., it appeared to ECR staff that the utility would not be eligible for staff assistance for several reasons,¹⁵ but primarily because it failed to pay its RAFs. The utility in each case withdrew its applications for staff assistance.

¹⁵ It appeared to staff that the utility would not be eligible for staff assistance based primarily on the following provisions of Rule 25-30.455(8), F.A.C.:

(8) In arriving at a recommendation whether to grant or deny the petition, the following shall be considered:

...

(b) Whether the petitioner's books and records are organized consistent with Rule 25-30.110, F.A.C., so as to allow commission personnel to verify costs and other relevant factors within the 30-day time frame set out in this rule;

(c) Whether the petitioner has filed annual reports;

Staff believes that many of this utility's problems may be due to its loss of approximately \$9,140 on gross revenues of \$49,942 per year. Moreover, the President of this utility did not understand how to take advantage of the price indexes and pass throughs available until after extensive discussions with staff earlier this year. While the utility's gross revenues of \$49,942 for 2006 are less than a third of the maximum to be eligible for staff assistance (cap is \$150,000), the utility has been caught in a "catch 22" -- it is not making enough to be able to pay its RAFs, but, in the past, staff has denied an application for a staff assisted rate case when the utility was not current on paying RAFs. While the rule states that whether the petitioner has paid applicable RAFs must be considered, in the past, staff has not approved a request for a staff assisted rate case until the utility became current on RAFs.

Staff further believes that the payment plan approved in the Settlement/Pay-Plan Order issued June 21, 2004 (\$500 per month) could not be realistically sustained on the utility's original rates. In 2004, Mr. Knowles, the utility's President, indicated that he could abide by the payment plan of \$500 per month. Staff, however, does not believe it was possible for this utility to make the \$500 monthly payment without outside sources of revenue.

Therefore, instead of initiating a show cause proceeding for the utility's failure to comply with the payment plan, staff believes that the remaining amount of regulatory assessment fees, plus appropriate penalty and interest, for the years 1995 through 2003, totaling \$21,220.41, should be submitted to Financial Services for further collection efforts or for permission to write off the account as uncollectible.

(d) Whether the petitioner has paid applicable regulatory assessment fees;

...

(g) Whether the petitioner has complied in a timely manner with all Commission decisions and requests affecting water and wastewater utilities for 2 years prior to the filing of the application under review

Issue 2: What action should the Commission take for Kincaid Hills Water Company's failure to timely remit the appropriate regulatory assessment fees, plus the statutory penalty and interest, as required by Sections 350.113 and 367.145, F.S., and Rule 25-30.120, Florida Administrative Code, for the years 2004, 2005, and 2006?

Recommendation: In accordance with Sections 367.145(1)(b) and 367.161, F.S., Kincaid Hills should be ordered to pay the full remaining amount due of \$2,945.88, which represents the appropriate remaining regulatory assessment fees (\$225.01), plus the statutory penalty and interest, as required by Sections 350.113 and 367.145, F.S., and Rule 25-30.120, Florida Administrative Code, for the years 2004, 2005, and 2006, with interest being calculated through December 31, 2007. The utility should be allowed to enter into a payment plan as discussed below in the Staff Analysis. Further, if utility fails to comply with this payment plan, the utility should be put on notice that it would be subject 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., or revocation proceedings pursuant to Section 367.161(2), F.S. (Jaeger)

Staff Analysis: For the years 2004-2006, the utility paid the 2006 RAFs in the amount of \$2,247.39 on August 28, 2007 (five months late). Also, on November 26, 2007, the utility paid another \$4,000 by cashiers check which paid the 2004 RAFs in full, and only left a balance of \$225.01 on the 2005 RAFs. Rule 25-30.120(2)(b), F.A.C., requires payments for the year in question to be made on the following March 31st. Pursuant to Sections 350.113(3)(e) and 367.145, F.S., and Rule 25-30.120(1), F.A.C., each utility shall remit annually RAFs in the amount of 0.045 of its gross operating revenue. Pursuant to Rule 25-30.120(2), F.A.C., "[t]he obligation to remit the [RAFs] for any year shall apply to any utility which is subject to [the] Commission's jurisdiction on or before December 31 of that year or for any part of that year, whether or not the utility has actually applied for or been issued a certificate." Also, if such payment is not timely made, the utility is obligated to remit a statutory penalty and interest. The penalty is five percent per month up to a maximum of five months (i.e., 25 percent),¹⁶ and the interest is "one percent for each thirty days or fraction thereof, not to exceed a total of 12 percent per annum."¹⁷ As noted in Order No. PSC-98-0474-FOF-SU, issued April 11, 1998,¹⁸ "Florida statutes do not provide the Commission with the discretion to waive the statutory penalties and interest associated with the delinquent regulatory assessment fees."

¹⁶ See Section 350.113(4), F.S., and Rule 25-30.120(7)(a)1., F.A.C.

¹⁷ See Rule 25-30.120(7)(a)2., F.A.C.

¹⁸ In Docket No. 971635-SU, In re: Notice of abandonment of wastewater system in Citrus County by RHV Utility, Inc.

The time period for the 2004 and 2005 RAFs has long since passed, and the RAFs for 2006 were not paid until August 28, 2007, which was five months late. Therefore, the maximum penalty of 25 percent is due for each of the three years.

Using the 4.5 percent of gross revenues, and adding in the statutory penalty and interest, staff calculates the total amount due from the utility for the years 2004, 2005, and 2006 through December 31, 2007, to be \$2,945.88.¹⁹ Staff's calculations are shown as follows.

| <u>Year</u> | <u>Revenues</u> | <u>RAFs(4.5%)</u> | <u>Penalty(25%)</u> | <u>Interest (Thru 12/31/07)</u> | <u>Total</u> |
|-------------|-----------------|-------------------------|---------------------|---------------------------------|--------------|
| 2004 | \$46,137 | \$ 0 ²⁰ | \$ 519.04 | \$ 622.85 | \$1,141.89 |
| 2005 | \$47,752 | \$ 225.01 ²¹ | \$ 537.21 | \$ 367.55 | \$1,129.77 |
| 2006 | \$49,942 | \$ 0 ²² | \$ 561.85 | \$ 112.37 ²³ | \$ 674.22 |
| Total | \$143,831 | \$ 225.01 | \$1,618.10 | \$1,102.77 | \$2,945.88 |

Staff has made several attempts by both the telephone and through correspondence²⁴ to have the utility pay the amounts due, and has been successful in having the utility pay the 2004 and 2006 RAFs, plus all but \$225.01 of the 2005 RAFs. Also, the utility states that it hopes to be able to pay the remaining balance of \$2,945.88 within a few weeks. Based on these good faith efforts of the utility, staff recommends that the Commission not take actions at this time that might further aggravate the utility's financial position.

Section 367.145(1)(b), F.S., provides that "in addition to the penalties and interest otherwise provided, the commission may impose a penalty upon a utility for failure to pay regulatory assessment fees in a timely manner in accordance with s. 367.161." Section 367.161(1), F.S., 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, F.S., or any lawful order of the Commission. 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). By failing to comply with the above-noted requirements of Section 367.113(4), F.S., and Rule 25-30.120, F.A.C., and failing to timely pay its 2004, 2005, and 2006

¹⁹ After the payment of \$2,247.39 on August 28, 2007, interest accrued at \$42.25 per month on the outstanding balance of \$4,225.01 through November 30, 2007. After the second payment of \$4,000 on November 26, 2007, the outstanding balance was only \$225.01, and interest now only accrues at the rate of \$2.25 per month.

²⁰ Before the payment of \$4,000 on November 26, 2007, the past due amount of 2004 RAFs was calculated to be \$2,076.17. With the payment, \$2,076.17 was applied to the 2004 RAFs paying them in full, but leaving the amounts for penalty and interest as shown.

²¹ Before the payment of \$4,000 on November 26, 2007, the past due amount of RAFs for 2005 was \$2,148.84. With \$2,076.17 being applied to the 2004 RAFs, the remainder of \$1,923.83 was applied to the 2005 RAFs, leaving a balance of \$225.01.

²² Utility paid RAFs of \$2,247.39 on August 28, 2007.

²³ Because RAFs were paid on August 28, 2007, interest ceased to accrue on the 2006 RAFs as of that date.

²⁴ In an attempt to secure payment, staff mailed letters notifying Kincaid of its deficiencies on: April 20, 2005 for the 2004 RAFs; April 11, 2006 for the 2005 RAFs; and April 18, 2007 for the 2006 RAFs. Also, a combined delinquency letter for the 2004 and 2005 RAFs was mailed on August 10, 2006. Finally, on August 21, 2007, letters addressing the deficiencies in all three years were mailed to the utility. The utility's only response was to pay the RAFs for the year 2006 of \$2,247.39, and to state in telephone conversations that it would get back on the payment plan of \$500 per month.

RAFs, the utility's acts were "willful" in the sense intended by Section 367.161, F.S. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, 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.

Because the utility has paid \$6,437.49 since August 28, 2007, staff believes that the Commission should make one "last-ditch" effort to make this utility financially viable. Although, there was a continued pattern of disregard for the timely payment of RAFs, the utility indicated that once it received the combined 2006 price index and pass through increase (4.5 percent for RAFs) in June 2007 that it would be in position to pay the RAFs. In the five months since June 2007, the utility has almost paid off the 2004-2006 RAFs (only \$225.01 remaining on the 2005 RAFs).

Staff further notes that in establishing rates, the Commission normally includes in its determination of the revenue requirements the utility's obligation to pay its RAFs. However, when Alachua County gave jurisdiction over the regulation of privately owned water and wastewater utilities to this Commission in June of 1992,²⁵ this utility was already in existence and had rates approved by the County. In taking over jurisdiction of Kincaid, the Commission merely approved those rates already being charged by the utility pursuant to the "grandfather" provisions of Section 367.171, F.S.²⁶

Since the granting of the "grandfather" certificate and approval for the utility to continue charging the rates approved by the County, the utility has applied for two staff assisted rate cases,²⁷ but in each case, having been advised by staff that it did not appear to meet the requirements for staff assistance, the utility subsequently withdrew its applications. Staff also notes that on March 30, 2007, the utility applied for: (1) a 2006 price index increase; and (2) a pass-through increase to recognize that its rates had never been increased to take into account that it must pay regulatory assessment fees of 4.5 percent of gross revenues. The rate increase for the price index and pass through (4.5 percent for RAFs) was implemented on June 1, 2007. Although the utility's rates have now been increased for the RAFs, the question still remains as to whether the utility's current rates are compensatory.

The utility argues that, prior to the pass-through increase, it has been unable to pay the RAFs because its rates did not include the expense of the RAFs. Staff believes that, as with any utility, it is the obligation of the utility to show that its present rates are unreasonable and fail to

²⁵ Resolution granting jurisdiction was passed by the Alachua County Board of County Commissioners on June 30, 1992, and was acknowledged by the Commission by Order No. PSC-92-0964-FOF-WS, issued September 9, 1992, in Docket No. 920700-WS, In re: Resolution of the Board of County Commissioners of Alachua County declaring Alachua County subject to the provisions of Chapter 367, F.S.

²⁶ See Order No. PSC-93-1027-FOF-WU, issued July 13, 1993, in Docket No. 921195-WU, In re: Application for certificate to provide water service in Alachua County under grandfather right by Kincaid Hills Water Company. In "grandfathering" the rates already allowed by the County, the Commission made no specific provisions for RAFs and the utility did not apply for a pass-through of the 4.5 percent in RAFs until March 30, 2007.

²⁷ See Docket No. 930801-WU, In re: Application for staff assisted rate case in Alachua County by Kincaid Hills Water Company, and Docket No. 941015-WU, In re: Application for staff assisted rate case in Alachua County by Kincaid Hills Water Company.

compensate the utility for its prudently incurred expenses, and apply for increased rates when the current rates do not allow for a fair rate of return on its investment.²⁸ Moreover, the burden of proof for any increase in rates is always on the utility.²⁹ In the case at hand, although it did apply twice for a staff assisted rate case, the utility has never followed through on any request for an increase until staff assisted it in applying for the 2006 price index and the pass-through increase for the 4.5 percent regulatory assessment fees. Therefore, staff believes that the utility has only itself to blame if it has in fact been receiving rates that afforded less than compensatory revenues (and has gone at least 15 years without a rate increase).

Since June 20, 2004, the utility has paid \$18,247.39, with the most recent payments of \$2,247.39 and \$4,000 being made on August 28, 2007, and November 26, 2007, respectively. If you look at the last three years, the utility's RAF payments would have been more than enough to keep up with current obligations, but it just has not been able to catch up for the years 1995-2003 under its current rates. Based on all the above, staff recommends that Kincaid not be made to show cause why it should pay any additional penalty in addition to the mandatory statutory penalties of \$1,618.10.

For the remaining amount due for the years 2004-2006, the utility indicated that it could get back on a payment plan of \$500 per month. Staff believes that \$500 per month, even with the two price index increases and the pass-through increase, is overly optimistic.

For the total amount due through December 31, 2007, of \$2,945.88, staff believes the utility should be allowed to enter into a payment plan. As discussed in Issue 4, staff is recommending that the Commission find the utility eligible for a staff assisted rate case. The payment plan should not start until the utility receives increased rates pursuant to the staff-assisted rate case (or the Commission determines in the staff assisted rate case that the current rates are compensatory). Upon a final determination on the appropriate rates in the staff-assisted rate case, after one full month of the approved final rates, the utility should be required to pay \$300 per month on the 20th of each following month, until the 2005 RAFs are paid, and the appropriate penalty and interest for the years 2004-2006 are paid off. Interest shall continue to accrue at the rate of 1% per month on the unpaid balance of \$225.01, until the first payment of \$300 is made under the payment plan. If the utility fails to file for a staff assisted rate case and pay the \$1,000 filing fee within six months of the date of the Order approving the payment plan, the utility should begin making \$300 payments under the payment plan on the 20th day of the first month that follows this six month period. The payment plan should be submitted to the Division of Accounting and Auditing of the Department of Financial Services for final approval. Pursuant to Rule 69I-21.003(4), F.A.C., in submitting the payment plan for approval, the Commission should indicate that there would be harm to the State of Florida if the payment plan is not approved, and the utility is pressed to pay the total amount due in one lump sum payment, there is a real danger of abandonment or failure to maintain the safe provision of water to the customers of Kincaid.

If the utility fails to make any payments in accordance with this payment plan, after two further collection efforts, the total amount due should be submitted to the Division of Accounting

²⁸ See South Florida Natural Gas v. Florida Public Service Commission, 534 So. 2d 695 (Fla. 1998).

²⁹ See Florida Power Corporation v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982).

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and Auditing of the Department of Financial Services for further collection efforts or for permission to write off the account as uncollectible. Further, if the utility fails to comply with the payment plan, the utility would be subject 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., or revocation proceedings pursuant to Section 367.161(2), F.S.

Issue 3: Should the Commission order Kincaid Hills Water Company to show cause, in writing within 21 days, why it should not remit a penalty of \$1,266 as authorized by Rule 25-30.110(7)(b), F.A.C., for its failure to timely file its 2004, 2005, and 2006 Annual Reports?

Recommendation: No. The Commission should not impose the penalty authorized by Rule 25-30.110(7)(b), F.A.C., and Kincaid Hills should not be ordered to show cause why it should be penalized \$1,266 for its failure to timely file its 2004, 2005, and 2006 Annual Reports. (Kaproth, Jaeger)

Staff Analysis: Rule 25-30.110, F.A.C., 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 unless an extension of time is granted. Requests for extensions must be in writing and must be filed by March 31. The utility requested and was granted one extension for its 2004 Annual Report. With the extension, that report was due on May 2, 2005. However, that report was not filed until August 4, 2005, and, thus, was 94 days late.³⁰ Also, the 2005 Annual Report was filed on October 24, 2006, with no extension, and was 207 days late.³¹ The 2006 Annual Report was filed on July 30, 2007, with no extension, and was 121 days late.³²

Pursuant to Rule 25-30.110(6)(c), F.A.C., any utility that fails to file a timely annual report is subject to penalties, absent demonstration of good cause for the noncompliance. The standard penalty for Class C utilities set out in Rule 25-30.110(7), F.A.C., is \$3 per day. All three of the annual reports were late for a total of 422 days ($94 + 207 + 121 = 422$). Thus, if the standard penalty of \$3 per day was imposed pursuant to Rule 25-30.110(6)(c), F.A.C., the utility would owe \$1,266 in penalties. However, pursuant to that same rule, upon a showing of good cause for the noncompliance, the Commission may impose lesser or greater penalties.

Staff believes that the circumstances in this case are such that the penalty set forth in Rule 25-30.110, F.A.C., should not be imposed. In the last five months, the utility has worked diligently to pay off the 2004-2006 RAFs and has now filed all of its annual reports. Because of its financial problems and the need for maintenance, the utility has had problems with timely filing its annual reports and could not afford an accountant to assist it in such filing.

³⁰ For the 2004 Annual Report, staff sent one certified letter dated July 12, 2005, which was signed for by Mr. Knowles on July 16, 2005, advising the utility that the 2004 Annual Report was late. The annual report was submitted on August 4, 2005, and was 94 days late (due date had been extended to May 2, 2005). By letter dated August 8, 2005, Commission staff requested that the utility pay the penalty of \$282 ($94 \times \$3 = \282).

³¹ For the 2005 Annual Report, staff sent three certified letters. The first letter, dated April 12, 2006, was signed for by Mr. Knowles on April 29, 2006. The second letter, dated May 17, 2006, was signed for on May 27, 2006, by Mr. Knowles. The third letter, dated October 26, 2006, was signed for on November 18, 2006. Staff also sent a noncertified letter dated August 10, 2006, advising Kincaid that the report would be 153 days late as of September 1, 2006. By that same letter, staff advised that a penalty of \$3 per day could be assessed pursuant to Rule 25-30.110(7), F.A.C. In the letter dated October 26, 2006, staff noted that the 2005 Annual Report had been filed on October 24, 2006, and staff requested the utility submit a check in the amount of \$621 for the late-filing of its 2005 Annual Report ($207 \text{ days late} \times \$3 = \$621$).

³² For the 2006 Annual Report, staff also sent three certified letters – the first one dated May 2, 2007, and signed for on May 12, 2007; the second one dated June 6, 2007, and signed for on June 9, 2007; and the third one dated August 6, 2007 (Domestic Return Receipt was returned unclaimed – after three attempts to deliver dated August 9, 2007, September 1, 2007, and September 6, 2007). The 2006 Annual Report was not filed until July 30, 2007, and was 121 days late. By the August 6, 2007 letter, staff requested the utility submit a check in the amount of \$363 for the late-filing of its 2006 Annual Report ($121 \text{ days late} \times \$3 = \$363$).

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Accordingly, pursuant to Rule 25-30.110(6)(c), F.A.C., staff recommends that the Commission not impose the \$3 per day penalty authorized by Rule 25-30.110(7)(b), F.A.C. However, the utility should be put on notice that failure to timely file future annual reports will subject it to the penalties authorized by 25-30.110(7), F.A.C., and 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., or revocation proceedings pursuant to Section 367.161(2), F.S.

Issue 4: What actions should the Commission take to promote the future collection of regulatory assessment fees and the viability of this utility?

Staff Recommendation: The utility should be considered eligible for a staff assisted rate case, provided that it has complied with all other requirements for staff assistance. Although a staff assisted rate case may be initiated upon compliance with the above, if the utility fails to pay regulatory assessment fees for the years after 2006 and it is during the pendency of the staff assisted rate case, staff should be directed to submit a recommendation as to whether the staff assisted rate case should be closed. (Kaproth, Jaeger)

Staff Analysis: Staff believes that the viability of this utility is in question until it receives rates that give it the opportunity to earn a fair rate of return on its investment, and pay its legitimate and prudent expenses including RAFs. To ascertain the appropriate rates, staff believes that a staff assisted rate case is necessary.

In considering whether to grant staff assistance, Rule 25-30.455(8), F.A.C.,³³ requires staff to consider, in pertinent part, the following:

(d) Whether the petitioner has paid applicable regulatory assessment fees;

...

(g) Whether the petitioner has complied in a timely manner with all Commission decisions and requests affecting water and wastewater utilities for 2 years prior to the filing of the application under review;

It is important to note that Rule 25-30.455(8), F.A.C., states that payment of RAFs and the timely compliance with all Commission decisions are only factors that must be considered. Staff believes that under the facts of this case, and noting the good faith payments of \$6,247.39 over the last three months, the utility should be considered eligible for staff assistance provided that the utility complies with all other requirements of Section 367.0814, and Rule 25-30.455, F.A.C.

³³ Pursuant to Rule 25-30.455(8), F.A.C., the above-noted items must only be considered in arriving at a decision whether to grant or deny staff assistance, and are not necessarily dispositive in and of themselves.

Issue 5: Should this docket be closed?

Recommendation: No. If the Commission approves a payment plan, the docket should remain open to allow staff to contact the Department of Financial Services to verify its approval of the payment plan. Once the payment plan has been approved, the docket should remain open until the staff assisted rate case is opened or until the payment plan is concluded if the utility does not proceed with a staff assisted rate case. Upon either of the above happening, the docket should be closed administratively. (Kaproth, Jaeger)

Staff Analysis: If the Commission approves a payment plan, the docket should remain open to allow staff to contact the Department of Financial Services to verify its approval of the payment plan. Once the payment plan has been approved, the docket should remain open until the staff assisted rate case is opened or until the payment plan is concluded if the utility does not proceed with a staff assisted rate case. Upon either of the above happening, the docket should be closed administratively.