



Public Service Commission

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RECORDS AND REPORTING
K.K. C.H.

DATE: JUNE 18, 1998
TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)
FROM: DIVISION OF LEGAL SERVICES (FERGUSON, VACCARO)
DIVISION OF ADMINISTRATION (SEWELL, LAKE)
DIVISION OF WATER AND WASTEWATER (T.L. DAVIS, KAPROTH)
RE: DOCKET NO. 971504-WU - INVESTIGATION OF WATER RATES OF
A.P. UTILITIES, INC. IN MARION COUNTY FOR POSSIBLE
OVEREARNINGS.

DOCKET NO. 980729-WU - INITIATION OF SHOW CAUSE
PROCEEDINGS AGAINST A.P. UTILITIES, INC. FOR VIOLATION OF
RULE 25-30.110, F.A.C., ANNUAL REPORTS, AND RULE 25-
30.120, F.A.C., REGULATORY ASSESSMENT FEES.
COUNTY: MARION

AGENDA: JUNE 30, 1998 - REGULAR AGENDA - PROPOSED AGENCY ACTION ON
ISSUE 2 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\980729.RCM

CASE BACKGROUND

A.P. Utilities, Inc. (APU or utility) is a Class B water utility operating in Marion County. APU provides water service to approximately 1,200 customers in twelve subdivisions. In its 1996 annual report, the utility reported water operating revenues of \$244,277 and operating expenses of \$176,413, resulting in net operating income of \$67,864.

By Order No. 21762, issued August 21, 1989 in Docket No. 881603-WU, the Commission granted a transfer of Certificate No. 380-W from North Central Florida Utilities, Inc. to APU. On

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November 30, 1990, Philip Woods purchased APU from Michael Blake, and by Order No. 24977, issued August 26, 1991 in Docket No. 910117-WU, the Commission approved the transfer of majority control. The purchase also included the Aqua Pure Water Company (Aqua Pure) and Marico Properties, Inc. (Marico). By Order No. 25063, issued September 13, 1991 in Docket No. 910119-WU, the Commission approved the transfer of assets from Marico to APU, and by Order No. 25075, issued September 17, 1991 in Docket No. 910118-WU, the Commission approved the transfer of assets from Aqua Pure to APU.

Since the transfer of ownership of APU to Philip Woods, the utility has failed to correct deficiencies in its 1993 annual report, failed to file its 1994, 1995 and 1996 annual reports, and failed to pay its regulatory assessment fees for each of the years 1991 through 1996. By Order No. PSC-97-0286-FOF-WU, issued in Docket No. 961141-WU on March 13, 1997, the Commission ordered the utility to show cause, in writing, within 20 days why it should not remit a penalty for failure to file its 1994 and 1995 annual reports, failure to pay its regulatory assessment fees for each of the years 1991 through 1995, and failure to correct deficiencies in its 1993 annual report. The utility failed to respond to the Commission order, and by that order the utility's failure to respond was deemed an admission of the facts. The delinquent regulatory assessment fees, associated penalties and interest, and penalties associated with delinquent annual reports totaling \$94,326.75, have been referred to the Department of Banking and Finance's Office of the Comptroller for collection (regulatory assessment fees: \$44,159.36; penalty: \$11,039.83; interest: \$14,895.06; and penalty for delinquent annual reports: \$24,232.50).

By Order No. PSC-97-1556-PCO-WU, issued in Docket No. 971076-WU, on December 11, 1997, the Commission ordered APU to show cause, in writing, within 20 days of the order, why it should not remit a penalty for failing to timely file its annual report and failing to remit its regulatory assessment fees for 1996. The order also directed the utility to immediately remit regulatory assessment fees to the Commission for 1996. The utility failed to respond to the Commission order, and by that order the utility's failure to respond was deemed an admission of the facts. The delinquent regulatory assessment fees, associated penalties and interest, and penalties associated with the untimely filed annual report totaling \$17,501.26, have been referred to the Department of Banking and Finance's Office of the Comptroller on March 5, 1998 for further collection efforts (regulatory assessment fees: \$10,992.47; penalty: \$2,748.12, interest: 1,209.17; and penalty for untimely filed 1996 annual report \$2,551.50).

Further, although the utility untimely filed its 1996 annual report on October 6, 1997, the annual report contained deficiencies. By letter dated October 16, 1997, staff notified the utility of the deficiencies. The utility was given until November 10, 1997, to correct them. The utility never responded.

The utility also owes \$10,992.47 in regulatory assessment fees for 1997. By letter dated December 9, 1997, staff notified the utility that the regulatory assessment fees were due on March 31, 1998. The utility neither filed for an extension nor remitted the fees.

In addition to the utility's failure to file annual reports and pay regulatory assessment fees, it also appears that the utility is overearning. By Order No. PSC-98-0044-PCO-WU, issued January 6, 1998, in Docket No. 971504-WU, the Commission initiated an investigation into APU's rates and charges for potential overearnings. By that order, the Commission required APU to perform the following: (1) place its revenues subject to refund pending the Commission's investigation of the utility's possible overearnings; (2) provide security in the form of a bond, letter of credit or escrow agreement to guarantee any potential refund of its revenues; and (3) escrow 4.5% of its revenues to ensure payment of APU's 1998 regulatory assessment fees. APU has failed to comply with the Commission's order. Furthermore, the staff audit in the investigation of the utility's potential overearnings indicate that APU has failed to maintain its books and records in compliance with the 1994 National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts (USOA), as required by Rules 25-30.115, Florida Administrative Code.

This recommendation addresses the utility's failure to remit its regulatory assessment fees for 1997, its failure to correct deficiencies in its 1996 annual report, its failure to comply with Order No. PSC-98-0044-PCO-WS and its failure to adequately maintain its books and records. Staff has consolidated Docket Nos. 980729-WU and 971504-WU for the purpose of filing this recommendation.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission order APU to show cause, in writing within 20 days, why it should not remit a penalty of \$3,037.50 for failing to correct deficiencies in its 1996 annual report pursuant to Rule 25-30.110, Florida Administrative Code?

RECOMMENDATION: Yes. APU should be ordered to show cause, in writing within 20 days, why it should not be fined \$3,037.50 (225 days x \$13.50 per day) for violation of Rule 25-30.110, Florida Administrative Code, in that it did not correct deficiencies in its 1996 annual report. The order to show cause should incorporate the conditions stated below in the staff analysis. (FERGUSON, KAPROTH)

STAFF ANALYSIS: Rule 25-30.110, Florida Administrative Code, 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. Requests for extension of time must be in writing and must be filed before March 31. One extension of 30 days is automatically granted. A further extension may be granted upon showing of good cause. Pursuant to Rule 25-30.110(8)(a), Florida Administrative Code, the Commission's Division of Water and Wastewater shall provide written notification to a utility if the annual report is incomplete. The utility shall provide the missing information no later than 30 days after the date on the notification. After 30 days, the annual report is considered delinquent.

Pursuant to Rule 25-30.110(6)(c), Florida Administrative Code, any utility that fails to file a timely, complete annual report is subject to penalties, absent demonstration of good cause for noncompliance. The penalty set out in Rule 25-30.110(7), Florida Administrative Code, for Class B utilities is \$13.50 per day. Staff calculated the penalty based on the number of days elapsed since November 10, 1997, and the date of this agenda. The date of this agenda is included in computing the number of days elapsed. The Commission may impose lesser or greater penalties, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code.

The utility's 1996 annual report was due on March 31, 1997. The utility filed the annual report on October 6, 1997. On December 11, 1997, the Commission issued Order No. PSC-97-1556-PCO-WU, in which it ordered APU to show cause, in writing within 20 days of the order, why it should not remit a penalty of \$2,551.50 for failing to timely file its 1996 annual report. As stated in the background, pursuant to the order, staff made reasonable

collection efforts, consisting of two certified letters requesting payment, dated January 26, 1998, and February 9, 1998. Those efforts were unsuccessful. Collection was transferred to the Department of Banking and Finance, Comptroller's Office on March 5, 1998 for further collection efforts. Although the utility filed its 1996 annual report, it failed to provide missing information as requested in staff's letter dated October 16, 1997. The utility's failure to correct those deficiencies constitutes a continuing violation of Rule 25-30.110(8)(a), Florida Administrative Code.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's failure to correct deficiencies in its annual report, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the utility 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 consideration of the foregoing, staff recommends that APU be ordered to show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$3,037.50 (225 days x \$13.50 per day) for violation of Rule 25-30.110, Florida Administrative Code, by failing to correct deficiencies in its 1996 annual reports. APU should be put on notice that further violations of Rule 25-30.110, Florida Administrative Code, will result in further action by the Commission.

Staff recommends that the show cause order incorporate the following conditions: APU's response to the show cause order must contain specific allegations of fact and law. Should APU file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings will be scheduled before a final determination of this matter is made. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. In the event that APU fails to file a timely response to the show cause order, the fine is deemed assessed with no further action required by the Commission. In that event, pursuant

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to Section 367.161, Florida Statutes, the penalty set forth in the show cause order shall be a lien on the real and personal property of the utility, enforceable by the Commission as a statutory lien under Chapter 85, Florida Statutes. The proceeds of such lien shall be deposited in the General Revenue Fund. This is the first time staff has recommended pursuing collection by the use of liens.

ISSUE 2: Should APU be ordered to show cause, in writing, within 20 days, why it should not remit a statutory penalty in the amount of \$2,198.49 and interest in the amount of \$439.70 for violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to remit regulatory assessment fees for 1997?

RECOMMENDATION: Yes. Staff recommends that APU be ordered to show cause, in writing, within 20 days, why it should not remit a statutory penalty in the amount of \$2,198.49 and interest in the amount of \$439.70 for violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to remit regulatory assessment fees for 1997. Staff also recommends that APU be ordered to immediately remit \$10,992.47 in regulatory assessment fees. The show cause order should incorporate the conditions stated below in the staff analysis. (FERGUSON, SEWELL, LAKE, T.L. DAVIS)

STAFF ANALYSIS: In establishing rates, the Commission includes in its determination of the revenue requirements the utility's obligation to pay regulatory assessment fees.

Pursuant to Section 350.113(4), Florida Statutes, and Rule 25-30.120(5)(a), Florida Administrative Code, a statutory penalty plus interest shall be assessed against any utility that fails to timely pay its regulatory assessment fees, in the following manner:

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

In addition, pursuant to Sections 367.145(1)(b) and 367.161, Florida Statutes, and Rule 25-30.120(5)(b), Florida Administrative Code, the Commission may impose an additional penalty upon a utility for failure to pay regulatory assessment fees in a timely manner.

A notice requiring payment of its regulatory assessment fees was mailed to the utility on December 9, 1997. To date, the utility has not remitted the fees.

Staff calculated the penalty and interest based on the number of days elapsed since the respective regulatory assessment fees were due and the date of this agenda. The date of this agenda is included in computing the amount of time elapsed. The Commission may impose lesser or greater penalties, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code.

Since 1991, this utility has collected the regulatory assessment fees and not paid them as required by statute. Regulatory assessment fees are intended to defray the costs incurred in Public Service Commission regulation of utilities. Apparently, the utility has no inclination to pay the fees voluntarily, nor does it appear that the utility is making a good faith effort toward payment. As discussed in Issue 1 of this recommendation, utilities are charged with the knowledge of the Commission's rules and statutes. Thus, the intentional act of failing to remit regulatory assessment fees would meet the standard for a "willful violation." Accordingly, staff recommends that the utility be ordered to show cause, in writing, within 20 days why it should not remit a statutory penalty in the amount of \$2,198.49 and interest in the amount of \$439.70 for violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to remit 1997 regulatory assessment fees. Further, APU should be ordered to immediately remit \$10,992.47 in outstanding regulatory assessment fees for 1997

Staff recommends that the show cause order incorporate the following conditions: APU's response to the show cause order must contain specific allegations of fact and law. Should APU file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings will be scheduled before a final determination of this matter is made. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. In the event that APU fails to file a timely response to the show cause order, the fine is deemed assessed with no further action required by the Commission. In that event, pursuant to Section 367.161, Florida Statutes, the penalty set forth in the show cause order shall be a lien on the real and personal property of the utility, enforceable by the Commission as a statutory lien under Chapter 85, Florida Statutes. The proceeds of such lien shall be deposited in the General Revenue Fund. The show cause order should be recorded as a lien on the real and personal property of the utility and its directors for the amount of delinquent regulatory assessment fees, and shall be enforceable as a lien upon being duly recorded with the Clerk of the County Court

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in Marion County pursuant to Section 55.10, Florida Statutes. The Commission should provide notice to the utility and its directors of such lien pursuant to Section 55.10, Florida Statutes. The Commission should pursue collection efforts as appropriate pursuant to Section 69.041, Florida Statutes. The proceeds of such lien should be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes. This is the first time staff has recommended pursuing collection by the use of liens.

ISSUE 3: Should the Commission order APU to show cause, in writing within 20 days, why it should not be fined \$5,000 per day for violation of Order No. PSC-98-0044-PCO-WU, by failing to provide security for potential overearnings and payment of 1998 regulatory assessment fees?

RECOMMENDATION: Yes. APU should be ordered to show cause, in writing within 20 days, why it should not be fined \$5,000 per day for violation of Order No. PSC-98-0044-PCO-WU. The order to show cause should incorporate the conditions stated below in the staff analysis. (VACCARO, FERGUSON)

STAFF ANALYSIS: By Order No. PSC-98-0044-PCO-WU, issued January 6, 1998, the Commission initiated an investigation into APU's rates and charges for potential overearnings. By that order, the Commission required APU to perform the following: (1) place its revenues subject to refund pending the Commission's investigation of the utility's possible overearnings; (2) provide security in the form of a bond, letter of credit or escrow agreement to guarantee any potential refund of its revenues; and (3) escrow 4.5% of APU's revenues to ensure payment of APU's 1998 regulatory assessment fees.

Following issuance of the Commission's order, staff discovered that the utility had failed to establish the required security for refunds and regulatory assessment fees. On January 28, 1998, staff sent a letter, along with a copy of the Commission's order, to Mr. Philip Woods, the president of APU, reminding Mr. Woods of the utility's obligations under the order. After repeated phone conversations between Mr. Woods and Commission legal staff, Mr. Woods mailed a letter, dated March 6, 1998, indicating that he had established interest bearing escrow accounts to provide the required security for overearnings and regulatory assessment fees. Mr. Woods included copies of the account applications, and stated that he had deposited \$2,944 into the overearnings account and \$654.59 into the regulatory assessment fees account. The Commission's order requires that \$2,694 per month be deposited for security of potential overearnings.

Following the utility's March 6 letter, staff verified that the accounts established by the utility were actually non-interest bearing checking accounts. Following repeated phone conversations, an informal conference was held between the utility and staff. At that time, the staff explained that the utility would be facing show cause and potential revocation proceedings if it did not file its 1997 annual reports, pay its 1997 regulatory assessment fees,

and establish interest bearing escrow accounts with deposits for revenues dating back to January of 1998 for regulatory assessment fees and December 16, 1997 (the date the Commission voted to require security) for guarantee of refunds for potential overearnings.

At this meeting, the utility presented signed escrow agreements. Staff notes that we actually prepared these agreements in order to guarantee that the utility would open the escrow accounts. These agreements were then provided to the Director, Division of Records and Reporting, for signature. Since that meeting, however, the utility has failed to provide all required deposits.

Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated, any lawful order of the Commission. As discussed in Issue 1 of this recommendation, utilities are charged with the knowledge of the Commission's rules and statutes. Thus, the intentional act of failing to comply with Order No. PSC-98-0044-PCO-WU, would meet the standard for a "willful violation."

The utility had ample opportunity to provide the security required by the Commission's order. Nevertheless, APU did not present staff with signed escrow agreements until April 22, 1998. The utility has failed to escrow all required funds as required by the Commission's order. Accordingly, staff recommends that APU be ordered to show cause, in writing within 20 days, why it should not be fined \$5,000 per day for violation of Order No. PSC-98-0044-PCO-WU.

Staff recommends that the show cause order incorporate the following conditions: APU's response to the show cause order must contain specific allegations of fact and law. Should APU file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings will be scheduled before a final determination of this matter is made. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. In the event that APU fails to file a timely response to the show cause order, the fine is deemed assessed with no further action required by the Commission. In that event, pursuant to Section 367.161, Florida Statutes, the penalty set forth in the show cause order shall be a lien on the real and personal property of the utility, enforceable by the Commission as a statutory lien

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under Chapter 85, Florida Statutes. The proceeds of such lien shall be deposited in the General Revenue Fund. This is the first time staff has recommended pursuing collection by the use of liens.

ISSUE 4: Are APU's books and records in compliance with Rule 25-30.115, Florida Administrative Code?

RECOMMENDATION: No. APU's books and records are not in compliance with Rule 25-30.115, Florida Administrative Code. APU should be given six months from the date of the Commission's order to bring its books and records in compliance with the NARUC USOA. At that time, staff will perform a compliance audit. If substantial compliance is not evident at that time, a show cause proceeding should be initiated. (VACCARO)

STAFF ANALYSIS: Rule 25-30.115, Florida Administrative Code, requires water and wastewater utilities to maintain their books and records in compliance with the 1994 NARUC USOA. On October 22, 1997, the Division of Auditing and Financial Analysis performed an audit of APU's books and records. In Audit Exception No. 1, the staff auditor reported that the utility's books and records were not maintained in substantial compliance with NARUC Water, "Class B," Accounting Instructions 2A & B in that:

The utility generated a non-accrual computerized spreadsheet for expenses, however, did not maintain a formal general ledger for recording data.

In instances, there was an inadequate audit trail between the utility's records and source documentation.

Based on the auditor's findings, he recommended that the utility be directed to maintain its books and records in compliance with NARUC Water, "Class B," Accounting Instructions 2A & B.

Staff believes that APU's failure to maintain its books and records in compliance with the NARUC USOA could warrant a show cause proceeding at this time. However, because this is the first case in which APU's books and records were fully reviewed by staff, staff believes that it is reasonable to allow the utility the opportunity to bring its books and records into compliance before enforcement proceedings are initiated. Staff believes that a six-month period is reasonable for APU to bring its books and records into compliance. If, at the end of six months, APU fails to be in substantial compliance with the NARUC USOA, show cause proceedings should be initiated immediately.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: If APU responds to the show cause order by remitting the penalty for failure to correct deficiencies in its 1996 annual report, and by remitting 1997 regulatory assessment fees and remitting all associated penalties and interest, Docket No. 980729-WU should be closed administratively. If APU fails to timely respond to the portion of the show cause order relating to that docket, the penalties and regulatory assessment fees set forth in the show cause order shall be liens on the real and personal property of the utility, enforceable by the Commission as statutory liens under Chapter 85, and Section 55.10, Florida Statutes, respectively, and Docket No. 980729-WU should be closed administratively. If APU responds to the show cause order and requests a hearing, Docket No. 980729-WU should remain open for final disposition. Regardless of APU's response regarding the show cause order relating to Docket No, 971504-WU, that docket should remain open for final disposition of the Commission's overearnings investigation and full payment of the utility's 1998 regulatory assessment fees. (VACCARO, FERGUSON)

STAFF ANALYSIS: If APU responds to the show cause order by remitting the penalty for failure to correct deficiencies in its 1996 annual report, and by remitting 1997 regulatory assessment fees and remitting all associated penalties and interest, staff believes that Docket No. 980729-WU should be closed administratively. If APU fails to timely respond to the portion of the show cause order relating to that docket, the penalties and regulatory assesement fees set forth in the show cause order shall be liens on the real and personal property of the utility, enforceable by the Commission as statutory liens under Chapter 85, and Section 55.10, Florida Statutes, respectively, and Docket No. 980729-WU should be closed administratively. If APU responds to the show cause order and requests a hearing, Docket No. 980729-WU should remain open for final disposition. Regardless of APU's response regarding the show cause order relating to Docket No, 971504-WU, that docket should remain open for final disposition of the Commission's overearnings investigation and full payment of the utility's 1998 regulatory assessment fees.