



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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RECORDS AND REPORTING

DATE: APRIL 6, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAI)

FROM: DIVISION OF LEGAL SERVICES (BRUBAKER) *JSB*
DIVISION OF ADMINISTRATION (KNIGHT) *JK*
DIVISION OF WATER AND WASTEWATER (HINES) *W*

RE: DOCKET NO. 980678-WU - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST GEM ESTATES UTILITIES, INC., IN PASCO COUNTY FOR VIOLATION OF RULE 25-30.110(3), F.A.C., ANNUAL REPORT, AND RULE 25-30.120, F.A.C., REGULATORY ASSESSMENT FEES.

AGENDA: 04/18/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\980678.RCM

CASE BACKGROUND

Gem Estates Utilities, Inc. (Gem Estates or utility) is a Class C water utility operating in Pasco County. Gem Estates provides water service to 220 customers in a mobile home subdivision. In its 1998 annual report, the utility reported water operating revenues of \$12,434 and operating expenses of \$16,838, resulting in a net loss of \$4,404.

The utility had not filed its annual reports from 1995 through 1997, nor remitted its regulatory assessment fees for the same period. The utility also owed penalties and interest for 1992 and 1993 for not timely remitting regulatory assessment fees. Ms. Jacqueline Cahill, president of Gem Estates, failed to respond to numerous attempts by Commission staff to contact her regarding the delinquent annual reports and regulatory assessment fees.

DOCUMENT NUMBER-DATE

04257 APR-68

FPSC-RECORDS/REPORTING

By Order No. PSC-98-0905-SC-WU, issued July 7, 1998, the Commission ordered that Gem Estates show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$3,888 for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual reports from 1995 through 1997 and failing to pay a penalty in the amount of \$399.28 and interest in the amount of \$271.10 for its apparent 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. The utility was also ordered to show cause why it should not remit a statutory penalty and interest of \$12.38 for failure to timely remit 1992 and 1993 regulatory assessment fees. Further, Gem Estates was ordered to immediately remit \$1,713.96 in delinquent regulatory assessment fees for the years 1995 through 1997. By Order No. PSC-98-0905-SC-WU, the Commission also determined that if Ms. Cahill did not respond to reasonable collection efforts, then the matter would be forwarded to the Comptroller's Office for further collection efforts. Gem Estates failed to file a response to the show cause order; thus, the penalties were deemed assessed.

According to Florida Department of Environmental Protection (DEP) staff, the utility also never responded to the Pasco County Department of Health's correspondence, nor DEP's attempts to serve her with process for outstanding notices of violation (NOV) for failing to maintain electric service to the utility. According to DEP staff, Ms. Cahill had all but abandoned the operations of the utility, with the utility operator managing the utility without being compensated and the homeowners' association remitting the last two payments for the utility's electricity bills.

DEP then issued its final NOV for the latest disruption of service and for failing to respond to previous NOVs. In this instance, DEP was successful in its attempts to serve the NOV on Ms. Cahill. DEP moved for an emergency injunction with the Circuit Court of Pasco County, officially blocking Ms. Cahill from operating the utility, moving that the court find a constructive abandonment of the utility by Ms. Cahill, and ordering a forced sale of the system.

By Order No. PSC-99-0265-SC-WU, issued February 10, 1999, the Commission stated its belief that no amount of communication from the Commission or other entities would force Ms. Cahill into compliance. Therefore, the Commission modified Order No. PSC-98-0905-SC-WU so that pursuant to Section 367.161, Florida Statutes, the penalty for delinquent annual reports and regulatory assessment

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fees set forth in that Order, will 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.

On February 15, 1999, a lien was filed with the Pasco County Clerk of Circuit Court in the amount of \$6,284.72. Order No. PSC-99-0265-SC-WU also stated that once the lien had been filed and recorded, the docket could be closed administratively. However, prior to the docket's closure, staff was contacted by Mrs. Holly Malberg, sister of Ms. Cahill, who offered to bring the utility into compliance.

On April 16, 1999, Mrs. Malberg became sole trustee of Gem Estates. Mrs. Malberg informed Commission staff that Ms. Cahill is suffering from a medical condition which has rendered her incapable of running the utility. There were no utility records of customer payments or the amounts due. According to Mrs. Malberg, Ms. Cahill deposited utility payments in the bank long after people sent payment, and some payments were never deposited at all. Mrs. Malberg later found some 1998 bank statements and ordered copies of the bank statements for the months of January thru March of 1999. Since becoming Sole Trustee, Mrs. Malberg has worked with Commission staff and the utility's customers to ensure that the utility is maintaining accurate records and depositing payments in a timely fashion.

With respect to the circuit court action, Mrs. Malberg fulfilled DEP's regulatory requirements which included interconnecting to the City of Zephyrhills at a cost of \$3,430, and placing a concrete slab around one of the utility's wells at a cost of \$260. According to DEP representatives, Mrs. Malberg additionally submitted \$500.00 for civil penalties to fulfill the remaining DEP requirements. DEP closed its case on December 27, 1999.

On November 3, 1999, Mrs. Malberg submitted a check with the Commission in the amount of \$3,183.18 for all delinquent and current RAF payments, penalties and interest. She also hired a certified public accountant to assist in compiling the available utility records, and on September 20, 1999, Ms. Malberg filed the utility's 1998 annual report. The 1995 through 1997 annual reports have not been filed to date.

On December 16, 1999, Mrs. Malberg filed a letter with the Commission which explained the financial and organizational difficulties facing the utility. Mrs. Malberg stated that since taking over the utility on behalf of her sister, she has satisfied

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the outstanding DEP requirements. Further, she has been keeping the utility records current and ensuring that customer payments are timely received and deposited. In addition to paying the DEP penalties and outstanding Commission RAFs, penalties and interest, Mrs. Malberg stated that she has incurred additional costs in paying outstanding taxes on the utility and repairing a well that had been struck by lightning. Finally, Mrs. Malberg stated that in light of these expenditures, she lacks the financial capacity to pay the remaining penalty of \$3,888 associated with the delinquent annual reports for 1995 through 1997.

Based on conversations held with Mrs. Malberg, staff has interpreted Mrs. Malberg's letter to be a request by the utility to waive Rules 25-30.110(3), (6), and (7), Florida Administrative Code. The above-referenced portions of Rule 25-30.110 require utilities to file annual reports and to pay penalties for the failure to file an annual report or to file for an extension of time in which to file the report.

Pursuant to Section 120.542(6), Florida Statutes, on December 22, 1999, Commission staff provided notice of the requested rule waiver to the Florida Department of State, which published notice of the waiver request in the Florida Administrative Weekly of January 7, 2000. The Commission did not receive any comments regarding the utility's petition. By letters dated February 16, 2000 and March 13, 2000, Mrs. Malberg agreed to extend the statutory time limitations set forth in Section 120.542, Florida Statutes, to allow Commission staff time for further investigation and allow staff's recommendation to be considered at the April 18, 2000 Agenda Conference.

This recommendation addresses the utility's rule waiver request and the disposition of the lien.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Gem Estates Utilities, Inc.'s petition for rule waiver of Rule 25-30.110(3), (6) and (7), Florida Administrative Code?

RECOMMENDATION: Yes, the Commission should grant Gem Estates Utilities, Inc.'s petition for rule waiver of Rule 25-30.110(3), (6) and (7), Florida Administrative Code, because the petition meets the requirements of Section 120.542, Florida Statutes. The Commission should refer \$3,888 in unpaid penalties associated with the failure to file 1995 through 1997 annual reports to the Comptroller's Office for permission to write off the account. Further, a notice acknowledging the satisfaction and discharge of the lien on the utility's property should be filed with the Pasco County Clerk of Circuit Court. (BRUBAKER)

STAFF ANALYSIS: As stated in the case background, Gem Estates had not filed its annual reports from 1995 through 1997 nor remitted its regulatory assessment fees for the same period. The utility also owed penalties and interest for 1992 and 1993 for not timely remitting regulatory assessment fees. By Order No. PSC-98-0905-SC-WU, issued July 7, 1998, the Commission ordered that Gem Estates show cause, in writing, within 20 days, why it should not remit a penalty in the amount of \$3,888 (\$2,331 for 777 days x \$3.00 per day for 1995; \$1,326 for 442 days x \$3.00 for 1996; \$231 for 77 days x \$3.00 for 1997) for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual reports from 1995 to 1997 and failing to pay a penalty in the amount of \$399.28 (\$139.50 for 1995; \$142.97 for 1996; \$116.81 for 1997) and interest in the amount of \$271.10 (156.24 for 1995; \$91.50 for 1996; \$23.36 for 1997) 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. The utility was also ordered to show cause why it should not remit a statutory penalty and interest of \$12.38 for failure to timely remit 1992 and 1993 regulatory assessment fees. Further, Gem Estates was ordered to immediately remit \$1,713.96 (\$558 for 1995, \$571.89 for 1996; and \$584.07 for 1997) in delinquent regulatory assessment fees. By Order No. PSC-98-0905-SC-WU, the Commission also determined that if Ms. Cahill did not respond to reasonable collection efforts, then the matter would be forwarded to the Comptroller's Office for further collection efforts. Gem Estates failed to file a response to the show cause order; thus, the penalties were deemed assessed.

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By Order No. PSC-99-0265-SC-WU, issued February 10, 1999, the Commission stated its belief that no amount of communication from the Commission or other entities would force Ms. Cahill into compliance. Therefore, the Commission modified Order No. PSC-98-0905-SC-WU so that pursuant to Section 367.161, Florida Statutes, the penalty for delinquent annual reports and regulatory assessment fees set forth in that Order, will 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.

On February 15, 1999, a lien was filed with the Pasco County Clerk of Circuit Court in the amount of \$6,284.72. Order No. PSC-99-0265-SC-WU also stated that once the lien had been filed and recorded, the docket could be closed administratively. However, prior to the docket's closure, staff was contacted by Mrs. Holly Malberg, sister of Ms. Cahill, who offered to bring the utility into compliance.

On April 16, 1999, Mrs. Malberg became sole trustee of Gem Estates. Mrs. Malberg informed Commission staff that Ms. Cahill is suffering from a medical condition which has rendered her incapable of running the utility. There were no utility records of customer payments or the amounts due. According to Mrs. Malberg, Ms. Cahill deposited utility payments in the bank long after people sent payment, and some payments were never deposited at all. Mrs. Malberg later found some 1998 bank statements and ordered copies of the bank statements for the months of January thru March of 1999. Since becoming Sole Trustee, Mrs. Malberg has worked with Commission staff and the utility's customers to ensure that the

utility is maintaining accurate records and depositing payments in a timely fashion.

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On November 3, 1999, Mrs. Malberg submitted a check with the Commission in the amount of \$3,183.18 for all delinquent and current RAF payments, penalties and interest. She also hired a certified public accountant to assist in compiling the available utility records, and on September 20, 1999, Ms. Malberg filed the utility's 1998 annual report. The 1995 through 1997 annual reports have not been filed to date.

On December 16, 1999, Mrs. Malberg filed a letter with the Commission which explained the financial and organizational difficulties facing the utility. Mrs. Malberg stated that since taking over the utility on behalf of her sister, she has satisfied the outstanding DEP requirements. Further, she has been keeping the utility records current and ensuring that customer payments are timely received and deposited. In addition to paying the DEP penalties and outstanding Commission RAFs, penalties and interest, Mrs. Malberg stated that she has incurred additional costs in paying outstanding taxes on the utility and repairing a well that had been struck by lightning. Finally, Mrs. Malberg stated that in light of these expenditures, she lacks the financial capacity to pay the remaining penalty of \$3,888 associated with the delinquent annual reports for 1995 through 1997.

Based on conversations held with Mrs. Malberg, staff has interpreted Mrs. Malberg's letter to be a request by the utility to waive Rules 25-30.110(3), (6), and (7), Florida Administrative Code. The above-referenced portions of Rule 25-30.110 require utilities to file annual reports and to pay penalties for the failure to file an annual report or to file for an extension of time in which to file the report.

Pursuant to Section 120.542(6), Florida Statutes, on December 22, 1999, Commission staff provided notice of the requested rule waiver to the Florida Department of State, which published notice of the waiver request in the Florida Administrative Weekly of

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January 7, 2000. The Commission did not receive any comments regarding the utility's petition.

The utility seeks a waiver of Rule 25-30.110(3), (6) and (7), Florida Administrative Code, because it believes the underlying purpose of the statute has been served in that the utility filed its 1998 annual report on September 20, 1999. Staff determined that the utility's 1998 annual report was not deficient, thus the report was in compliance with Rule 25-30.110(6) and (7), Florida Administrative Code.

The utility believes that the application of the rule would create a substantial hardship on its operations. In its petition, the utility states that the previous company president had been in charge of running the utility, but due to a medical condition was incapable of properly maintaining utility operations. The utility was out of regulatory compliance with both DEP and the Commission, and failed to respond to correspondence from DEP, the Commission and the Polk County Department of Health. Records were not maintained, and customer payments were either not timely deposited or else not deposited at all.

Further, the utility's 1998 annual report demonstrates that the utility is operating at a net loss of \$4,404. Mrs. Malberg states that imposition of the penalties associated with the delinquent 1995 through 1997 annual reports would only serve to increase the operating losses of the company and absorb funds needed to keep Gem Estates operational.

The underlying statutes pertaining to the rule in this instance are Sections 367.121(1)(c), and 367.161(2) Florida Statutes. Section 367.121, Florida Statutes, provides that the Commission shall require regular reports from utilities under its jurisdiction consistent with the uniform system and classification of accounts and may require preparation of the reports by a certified public accountant. Rule 25-30.110(3)(a), Florida Administrative Code, which requires utilities subject to the Commission's jurisdiction to file an annual report on or before March 31 of the following year, implements Section 367.121, Florida Statutes. Section 367.161(2), Florida Statutes, provides that the Commission has the power to impose penalties on utilities under its jurisdiction who have refused to comply or wilfully violate Florida Statutes, Commission rules, or orders. Rule 25-30.110(6)(c) and (7), Florida Administrative Code, which provides for penalties of \$3.00 per day for a Class C utility for failure to timely file its annual report, implements Section 367.161, Florida Statutes. The

purpose of requiring payment of penalties for late filing is to ensure compliance with Florida Statutes and Commission rules.

Section 120.542(2), Florida Statutes, in pertinent parts, provides that

variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and that application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, substantial hardship means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.

Staff believes that the utility has demonstrated a substantial operational and economic hardship in that Mrs. Malberg took over operation of the utility on her sister's behalf in 1999. As discussed previously, the utility was in a state of considerable disrepair and disorganization. Mrs. Malberg made a thorough search for all available utility records, and hired a certified public accountant to assist in the preparation and filing of the utility's 1998 annual report. As detailed previously, Mrs. Malberg has worked closely with Commission staff and has made a remarkable effort at personal expense to bring the utility into regulatory compliance. Also, the utility is continuing to lose money. Ordering the utility to remit the annual report penalties and spend money to prepare the delinquent annual reports would only add to the substantial economic hardship of the utility.

Staff also believes that the underlying purpose of the statute has been achieved. The utility has prepared and filed its 1998 annual report. Staff believes that little purpose would be served in requiring the utility to file its 1995 through 1997 annual reports, as the pertinent information is contained in its 1998 annual report. Records on the utility's operations were not maintained prior to Mrs. Malberg's intervention in 1999. Since that time, the utility has achieved compliance with the applicable regulations for both the Commission and DEP. Because the Commission now has the relevant information regarding the utility's operations pursuant to Florida Statutes and Commission rule, the underlying purpose of the statute has been achieved.

As discussed previously, pursuant to Section 120.542(6), Florida Statutes, on December 22, 1999, Commission staff provided notice of the requested rule waiver to the Florida Department of

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State, which published notice of the waiver request in the Florida Administrative Weekly of January 7, 2000. The Commission did not receive any comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, the Commission is required to issue an order in writing granting or denying the petition for waiver or variance stating the relevant facts and reasons supporting the Commission's decision within 90 days after receipt of the original petition. However, additional time was requested by staff in order to determine the status of the utility's former DEP violations. By letters dated February 16, 2000 and March 13, 2000, Mrs. Malberg agreed to extend the statutory time limitations set forth in Section 120.542, Florida Statutes, to allow Commission staff time for further investigation and preparation of staff's recommendation for the April 18, 2000 Agenda Conference.

Based on the foregoing, staff recommends that Gem Estates' petition for rule waiver should be granted because the utility has demonstrated that a waiver of Rule 25-30.110(3), (6) and (7), Florida Administrative Code, would serve the underlying purpose of Sections 367.121 and 367.161 Florida Statutes, and the application of the rule would create a substantial hardship for the utility.

In consideration of the foregoing, staff recommends that the Commission refer the \$3,888 in penalties associated with the delinquent 1995 through 1997 annual reports to the Comptrollers' Office for permission to write off the account. Further, staff recommends that the Commission should file notice with the Pasco County Clerk of Circuit Court acknowledging the satisfaction and discharge of the lien filed on the utility's property pursuant to Order No. PSC-99-0265-SC-WU.

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ISSUE 2: Should the docket be closed?

RECOMMENDATION: Yes, if the Commission approves Staff's recommendation, upon referral of the unpaid 1995 through 1997 annual report penalty to the Comptroller's Office, and upon Commission staff's filing notice with the Pasco County Clerk of Circuit Court acknowledging the satisfaction and discharge of the lien filed on the utility's property pursuant to Order No. PSC-99-0265-SC-WU, no further action will be required, and this docket should be closed. (BRUBAKER, HINES)

STAFF ANALYSIS: If the Commission approves Staff's recommendation, upon referral of the unpaid 1995 through 1997 annual report penalty to the Comptroller's Office, and upon Commission staff's filing notice with the Pasco County Clerk of Circuit Court acknowledging the satisfaction and discharge of the lien filed on the utility's property pursuant to Order No. PSC-99-0265-SC-WU, no further action will be required, and this docket should be closed.