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FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

MEMORANDUM

November 6, 1997

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FPSC - Records/Reporting

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

FROM: DIVISION OF LEGAL SERVICES (FERGUSON, VACCARO)
DIVISION OF WATER & WASTEWATER (DEWBERRY, GILCHRIST)
DIVISION OF ADMINISTRATION (SEWELL, LAKE)

RE: DOCKET NO. 971076-WB - A.P. UTILITIES, INC. -
INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST A.P.
UTILITIES, INC. IN MARION 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.

COUNTY: MARION

AGENDA: NOVEMBER 18, 1997 - REGULAR AGENDA - INTERESTED PERSONS
MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\971076RE.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 1,090 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.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

DOCKET NO. 971076-WU
November 4, 1997

By Order No. 21762, issued August 21, 1989 in Docket No. 881603, this Commission granted a transfer of Certificate No. 380-W from North Central Florida Utilities, Inc. (NCFU) to APU. On November 30, 1990, Philip Woods purchased APU from Michael Blake, and by Order No. 24977, issued August 20, 1991 in Docket No. 910117, this 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, this Commission approved the transfer of assets from Marico to APU, and by Order No. 25075, issued September 17, 1991 in Docket No. 910118-WU, this 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 and 1995 reports, and failed to pay its regulatory assessment fees for each of the years 1991 through 1995. 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 be fined for failure to file its 1994 and 1995 reports, and 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 Comptroller's office 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 letter dated August 29, 1997, staff notified Mr. Woods that because of his continued delinquency in failing to both file the annual report and remit regulatory assessment fees for 1996, this docket was opened to initiate show cause proceedings against the utility. Mr. Woods was directed to immediately file the delinquent annual reports, remit the delinquent regulatory assessment fees, and remit the appropriate penalties. Staff followed up with telephone calls and an additional letter dated September 12, 1997. The utility filed its annual reports for 1994, 1995 and 1996 on October 6, 1997. Upon reviewing the annual report, staff determined that there were a number of deficiencies. Staff sent a notice of correction to the utility on October 16, 1997. The grace

DOCKET NO. 971076-WU
November 4, 1997

period for correcting deficiencies in the annual report ends November 16, 1997. Currently, staff is conducting an audit and an investigation of APU for overearnings, which will be addressed in a future docket. Staff is considering the possibility of recommending that the utility place future regulatory assessment fees in an escrow account.

This recommendation addresses the utility's untimely filing of its 1996 annual report and its failure to remit its regulatory assessment fees for 1996.

DISCUSSION OF ISSUES

ISSUE 1: Should APU be ordered to show cause why it should not remit a penalty in the amount of \$2,551.50 for failing to comply with Rule 25-30.110, Florida Administrative Code, in that it did not timely file its 1996 annual report?

RECOMMENDATION: Yes. Staff recommends that APU should be ordered to show cause within 20 days why it should not remit a penalty in the amount of \$2,551.50 for violation of Rule 25-30.110, Florida Administrative Code, by failing to timely file its 1996 annual report. The show cause order should incorporate the conditions stated below in the staff analysis. (FERGUSON, VACCARO, DEWBERRY, GILCHRIST)

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 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. Incomplete or incorrect reports are considered delinquent, with a 30 day grace period in which to supply the missing information.

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. The penalty calculation is based on the number of days elapsed since March 31, or the approved extension date, and the actual date of filing. The date of filing 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.

By letter dated August 29, 1997 staff notified APU that since it had not filed its 1996 annual report, it was in apparent violation of Rule 25-30.110, Florida Administrative Code. The utility was directed to file a report by September 8, 1997, and pay the outstanding penalty assessed for failure to file the 1996

DOCKET NO. 971076-WU
November 4, 1997

annual report. The utility filed the 1996 annual report on October 6, 1997. Upon review, staff determined that the annual report was deficient. As of the date the 1996 annual report was filed, October 6, 1997, the utility's penalty for the delinquent 1996 report is \$2,551.50 (189 days x \$13.50 per day), pursuant to Rule 25-30.110(6), Florida Administrative Code. The penalty amount has not been remitted to 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). Thus, any intentional act, such as the utility's failure to timely file 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 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 consideration of the foregoing, staff recommends that APU be ordered to show cause within 20 days why it should not remit a penalty in the amount of \$2,551.50 for violation of Rule 25-30.110, Florida Administrative Code, by failing to timely file its 1996 annual report.

The show cause order should 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 requests a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings should be scheduled before a final determination on this matter is made. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause, and this docket should not be closed. If the utility responds to the show cause by remitting the penalties, this docket should be closed administratively.

DOCKET NO. 971076-WU
November 4, 1997

A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing. In the event APU fails to file a timely response to the show cause order, staff should be authorized to assess the penalty pursuant to Rule 25-30.110, Florida Administrative Code.

ISSUE 2: Should APU be ordered to show cause within 20 days why it should not remit a statutory penalty in the amount of \$2,748.12 and \$879.40 in interest for violation of Section 350.113, Florida Statutes, Section 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, in that it failed to pay regulatory assessment fees for 1996?

RECOMMENDATION: Yes. Staff recommends that APU should be ordered to show cause within 20 days why it should not remit a statutory penalty in the amount of \$2,748.12 and \$879.40 in interest totaling \$3,627.52 for violation of Section 350.113, Florida Statutes, Section 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, in that it failed to pay regulatory assessment fees for 1996. Further, APU should be ordered to immediately remit \$10,992.47 in outstanding regulatory assessment fees for 1996. The show cause order should incorporate the conditions stated below in the staff analysis. (FERGUSON, VACCARO, DEWBERRY, SEWELL, LAKE, GILCHRIST)

STAFF ANALYSIS: In its establishment of rates, the Commission includes in its determination of the revenue requirements the utility's obligation to pay regulatory assessment fees. However, this utility has failed to pay regulatory assessment fees since it came under Mr. Woods' ownership. As stated in the background, the outstanding amounts for 1991 through 1995 have been referred to the Comptroller's Office for further collection efforts. To date the utility has paid \$2,000 to a collection agent, of which the Division of Administration has received \$1,630. This amount was applied to the utility's delinquent 1991 regulatory assessment fees. The collection agent retained \$370 as a collection fee. **APU is also delinquent in its payment of 1996 regulatory assessment fees which is the subject of this issue.**

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.

Notices of delinquency for failure to pay its regulatory assessment fees were mailed to the utility on August 29, 1997, and September 12, 1997. The utility failed to respond to each of these notices. As of October 31, 1997, the utility owes the following for 1996: \$10,992.47 in regulatory assessment fees, as well as \$2,748.12 in penalties, and \$879.40 in interest for a total of \$14,619.99.

This utility has historically 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 why it should not remit a penalty in the amount of \$2,748.12 and interest in the amount of \$879.40 for its failure to pay regulatory assessment fees for 1996.

The show cause order should 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 request a hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings should be scheduled before a final determination on this matter is made. If the utility responds timely but does not request a hearing, a recommendation will be presented to the

DOCKET NO. 971076-WU
November 4, 1997

Commission regarding the disposition of the show cause, and this docket should not be closed. If the utility responds to the show cause by remitting the penalties set forth in Issue 1, the delinquent regulatory assessment fees and associated penalties and interest, this docket should be closed administratively.

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 APU fails to file a timely response to the show cause order, staff should be authorized to assess the penalty. Therefore, if no timely response is received from the utility, the penalty should be imposed with no further action required by the Commission. The penalty consists of \$2,551.50 for the utility's failure to timely file its 1996 annual report, and \$2,748.12 for failure to pay the regulatory assessment fees. The interest on the regulatory assessment fees in the amount of \$879.40 should also be imposed with no further action required by the Commission. Further, APU should be ordered to immediately remit \$10,992.47 in delinquent regulatory assessment fees for 1996.

Staff recommends that the Commission's show cause order direct the collection of fees, penalties, and interest to the Comptroller's office for further collection efforts if A.P. Utilities, Inc. fails to respond to reasonable collection efforts by Commission staff. Reasonable collection efforts shall consist of two certified letters requesting payment. The referral to the Comptroller's office would be based on the conclusion that further collection efforts by this Commission would not be cost effective. After referral to the Comptroller's office, the docket should be closed.