

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for exemption) DOCKET NO. 910655-WU
from Florida Public Service) ORDER NO. PSC-92-0410-FOF-WU
Commission regulation from) ISSUED: 05/27/92
provision of water service in)
Broward County by H2OULTON)
METERING SYSTEMS, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

Pursuant to notice, an administrative hearing was held before Commissioner Susan F. Clark, as Hearing Officer, on February 17, 1992, in Tallahassee, Florida, in the above-captioned matter.

APPEARANCES:

KEITH J. KANOUSE, ESQUIRE, Suite 353, Lake Wyman Plaza, 2424 North Federal Highway, Boca Raton, Florida 33431
On behalf of H2Oulton Metering Systems, Inc.

ALSO PRESENT: Robert F. Oulton, President, H2Oulton Metering Systems, Inc.

LILA JABER, ESQUIRE, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863
On behalf of the Commission Staff

WILLIAM E. WYROUGH, ESQUIRE, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863
On behalf of the Commissioners

The Hearing Officer's Recommended Order was entered on March 20, 1992. Exceptions were filed by H2Oulton Metering Systems, Inc. After consideration of the evidence, we now enter our order.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTS

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FINAL ORDER DENYING EXEMPTION,
REJECTING EXCEPTIONS, AND CLOSING DOCKET

BY THE COMMISSION:

H2Oulton Metering Systems, Inc., (H2Oulton or utility) requested an informal hearing pursuant to Section 120.57(2), Florida Statutes, when it protested proposed agency action Order No. 24936. Order No. 24936 denied H2Oulton's request for an exemption as a reseller pursuant to Section 367.022(8), Florida Statutes. Following the administrative hearing held on February 17, 1992, the Hearing Officer filed her Recommended Order on March 20, 1992.

The full text of the Hearing Officer's Recommended Order is set forth below.

I. BACKGROUND

On January 22, 1991, H2Oulton Metering Systems, Inc. (H2Oulton) requested a statewide exemption pursuant to Section 367.022(8), Florida Statutes. Section 367.022(8), Florida Statutes, provides that any person who resells water and wastewater service at a rate or charge which does not exceed the actual purchase price thereof and at least annually files with the Commission a list of charges and rates for all water service sold, the source and actual purchase price thereof, and any other information required by the Commission to justify the exemption, shall be exempt from Commission regulation.

Based on the facts set out in its application for an exemption and subsequent information provided by H2Oulton to the Commission, H2Oulton proposes to operate a network of franchised or company-owned service centers throughout the state. The proposed service centers would contract with landlords for the sub-metering program. H2Oulton would individually meter each unit and would retain ownership and the responsibility for any maintenance of the meters. H2Oulton would be responsible for reading the meters, collecting deposits, billing the tenants, receiving payment, terminating service for nonpayment and maintaining all records. The landlord,

according to H2Oulton, would be solely responsible for the payment of water and wastewater bills based upon the master meter usage. Tenants would pay H2Oulton for their utility service at a rate not exceeding the purchase price of the service being resold. H2Oulton contends that it is a utility which can provide these services, and thus is entitled to a resale exemption pursuant to Section 367.022(8), Florida Statutes.

By Order No. 24936, issued August 20, 1991, as proposed agency action, this Commission denied H2Oulton's request for exemption based on its determination that H2Oulton is not a utility. In the same Order, H2Oulton was ordered to cease holding itself out as a utility and to discontinue any collection of customer deposits and disconnection of water service. H2Oulton was ordered to modify its contract and any advertising or promotional materials by removing any reference to the aforementioned claims. Finally, the Commission ordered H2Oulton to provide a list of all properties to which it provides its services within counties under Commission jurisdiction within thirty days.

On September 6, 1991, H2Oulton filed its Petition on Proposed Agency Action and requested a hearing pursuant to Section 120.57, Florida Statutes. Subsequently, as reflected in its Statement of Issues and Positions filed January 31, 1992, H2Oulton agreed to waive any disputed issues of material fact, and requested an informal hearing pursuant to Section 120.57(2), Florida Statutes.

On February 11, 1992, H2Oulton filed a motion to request confidential classification of the information requested by Interrogatories Nos. 3 and 4 of the Commission Staff's First Set of Interrogatories. In the two interrogatories, the Commission Staff requested a list of all properties to which H2Oulton is presently providing submetering service. By Order No. 25823, issued February 28, 1992, the Commission granted H2Oulton's request for confidentiality of information requested in Interrogatories Nos. 3 and 4.

At the informal hearing on February 17, 1992, H2Oulton made an oral presentation regarding why it

believed it should be exempt from Commission jurisdiction under Section 367.022(8), Florida Statutes.

Ten exhibits were identified and admitted into evidence as follows: Exhibit No. 1, H2Oulton's Exempt Utility Services Agreement; Exhibit No. 2, Letter from Robert Oulton to Bill Lowe dated May 17, 1990; Exhibit No. 3, Letter from Bill Lowe to Robert Oulton dated June 14, 1990; Exhibit No. 4, Letter from Emily Moore to Nayola Frazier dated July 26, 1991; Exhibit No. 5, Water Conservation Opportunities for Local Governments report from Southwest Water Management District; Exhibit No. 6, Regulations of St. Johns River Water Management District an excerpt from Chapter 40C-2; Exhibit No. 7, Resolution of Dade County endorsing submetering to achieve water conservation; Exhibit No. 8, Amended Franchise Agreement on Cable; Exhibit No. 9, City of Fort Lauderdale, Florida Ordinance Section 24-50 regarding garbage collectors' rights to discontinue service; and Exhibit No. 10, City of Pompano Beach, Florida Ordinance 94.14 relating to garbage collectors' right to discontinue service.

On February 26, 1992, the Hearing Officer issued Order No. 25812, entitled "Order Establishing Post-Hearing Procedure." Order No. 25812 established filing dates for H2Oulton's Proposed Conclusions of Law and Exceptions to the Recommended Order.

II. FINDINGS OF FACT

By H2Oulton's request for an informal hearing pursuant to Section 120.57(2), Florida Statutes, H2Oulton waived any disputed issues of material fact. Since the issues in this hearing are legal in nature, findings of fact are not applicable.

III. CONCLUSIONS OF LAW

The Commission has exclusive jurisdiction over each water and wastewater utility pursuant to Section 367.011(2), Florida Statutes. As the applicant in this case, H2Oulton Metering Systems, Inc., has the burden of proving that it qualifies for a reseller exemption pursuant to Section 367.022(8), Florida Statutes.

1. H2Oulton is not a utility.

Section 367.021(12), Florida Statutes, states that:

"Utility" means a water or wastewater utility and except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide water or wastewater service to the public for compensation. (emphasis added)

H2Oulton does not have a system that it owns, operates, manages or controls. System is defined by Section 367.021(11), Florida Statutes, as follows:

"System" means facilities and land used or useful in providing service and, upon a finding by the commission, may include a combination of functionally related facilities and land.

H2Oulton does not own, operate, manage or control a water or wastewater facility or plant or land connected with such a facility. Accordingly, H2Oulton does not provide water or wastewater service.

H2Oulton is merely allocating costs for the master meter usage based on each individual tenant's consumption. H2Oulton stated that it installs, maintains, manages, and controls the individual unit water meters and shut-off valves supplying water to an apartment unit. H2Oulton claims that this establishes that it has a system. However, an aggregate of individual unit water meters installed by H2Oulton does not constitute a "system" within the meaning of Section 367.021(11), Florida Statutes, since it does not provide water or wastewater service. H2Oulton is, therefore, not a utility pursuant to Chapter 367, Florida Statutes.

2. Pursuant to Chapter 367, Florida Statutes, and the pertinent provisions of Chapters 9, 21, 22 and 30, Florida Administrative Code, the Commission exercises its

jurisdiction over water and wastewater utilities. The provisions of these rules governing customer deposits and interruption of services apply to water and wastewater utilities.

3. H2Oulton does not qualify for an exemption pursuant to Section 367.022(8), Florida Statutes. Pursuant to Section 367.022(8), Florida Statutes, the entity that resells water is exempt. H2Oulton does not propose to resell water, but proposes to provide the meters that measure the consumption and to provide the bills. Therefore, Section 367.022(8) does not apply.

4. Exemptions granted pursuant to Section 367.022(8), Florida Statutes, are not assignable to persons or entities.

H2Oulton claims that the landlord has assigned reseller rights to it. Section 367.071, Florida Statutes, is the only section of Chapter 367, Florida Statutes, which expressly deals with assignments. The section states in pertinent part that "[n]o utility shall . . . assign . . . its certificate of authorization, facilities or any portion thereof . . . without determination and approval of the commission that the proposed safe assignment . . . is in the public interest and that the . . . assignee . . . will fulfill the commitments, obligations, and representations of the utility." Section 367.022, Florida Statutes, does not provide for the assignability of exemptions.

5. Section 367.022(8), Florida Statutes, provides that the entity reselling water is exempt. There is no provision for consideration of any bailment relationship between such an entity and a submetering company. In this case, the landlord purchases the water from the local utility and is responsible for paying for water consumption via the master meter.

6. As stated in Conclusion of Law No. 1, H2Oulton is not a utility and, therefore, shall cease holding itself out as a utility.

7. The Florida Public Service Commission has no jurisdiction to enforce the provisions of Chapter 83, Florida Statutes.

IV. RECOMMENDATION

It is, therefore, recommended that H2Oulton should be required to immediately cease holding itself out as a utility. Since it is not a utility pursuant to Chapter 367, Florida Statutes, H2Oulton shall not avail itself of the provisions for collection of deposits and disconnection of service set forth in Chapter 25-30, Florida Administrative Code. In light of this recommendation, it would be inappropriate for H2Oulton to include in its contracts and advertising and promotional materials any reference to its having the powers of a utility or an exempt entity under Chapter 367, Florida Statutes. In order to protect the public interest, H2Oulton should be required to provide a copy of the final order in this matter to all customers with whom it has a current or pending submetering contract. Finally, H2Oulton's application for an exemption pursuant to Section 367.022(8), Florida Statutes, should be denied.

Based on the schedule set forth in the Hearing Officer's Order Establishing Procedure, Order No. 25812, H2Oulton filed its Exceptions to Hearing Officer's Recommended Order on April 7, 1992. Each of the four exceptions is discussed below.

A. Exception No. 1 - The definition of "utility" set out in Section 367.021(12), Florida Statutes, requires a "system" that is owned, operated, managed or controlled in the provision of water or wastewater service to the public for hire. In H2Oulton's opinion, the Hearing Officer's finding that H2Oulton is not a utility is erroneously based on her conclusion that H2Oulton does not possess any facilities or land and, therefore, does not have a "system". H2Oulton cites definitions from Black's Law Dictionary of the terms "facilities" and "facility" and the definition of "real property" set out in Section 192.001(12), Florida Statutes, to support its view that its meters and pipes and whatever interest in land it may have in a particular instance constitute a "system" as contemplated by Section 367.021(12), Florida Statutes.

We find that the Hearing Officer's Recommended Order clearly sets out the proper rationale for finding that H2Oulton does not possess a "system" in the sense required in Section 367.021(11) for a "utility." H2Oulton simply ignores the definition of "utility" in Section 367.021(12) which informs the meaning of "system" set out in Section 367.021(11). The "system" must have facilities and land used to provide water or wastewater service to the public for compensation. H2Oulton does not provide the water or wastewater service in the situations in which it proposes to operate. The provider of the water or wastewater in these situations proposed by H2Oulton is the landlord who pays the bill to the utility provider of the water or wastewater service that is resold. This scenario makes the landlord a "utility" who may be declared exempt pursuant to Section 367.022(8), Florida Statutes.

Based on the foregoing, we find it appropriate to reject this exception.

B. Exception No. 2 - H2Oulton states that it takes exception to the last sentence of the first paragraph of page 5 of the Recommended Order which is as follows:

H2Oulton is providing a service to landlords to allocate water and wastewater usage service costs on the basis of individual tenant's usage.

H2Oulton contends that this is an incorrect characterization of its service as one for landlords only because it believes this is a service for the tenants as well. This is because, without H2Oulton providing its service, the landlord would simply arbitrarily allocate the total water bill pro rata among all the tenants in a multi-unit complex. This would be unfair to those tenants with a less than average level of consumption. Also, H2Oulton asserts that its service "benefits all of us in Florida -due to its resultant water conservation."

Even if H2Oulton's point of view is correct, this statement in the Recommended Order is not, in itself, a legal conclusion. It merely characterizes H2Oulton's service as one to landlords involving the allocation of water and wastewater costs on the basis of the tenants' usage as opposed to utility service. This statement does not reach a conclusion on whether some tenants might view H2Oulton's service as a service to them also, nor does it conclude that H2Oulton is or is not encouraging water conservation.

These are factual determinations that were not a part of this hearing. Therefore, we find it appropriate to reject this exception.

C. Exception No. 3 - H2Oulton takes exception to the Hearing Officer's conclusion that it must be a "utility" before it can qualify for exemption under Section 367.022(8), Florida Statutes. It is H2Oulton's position that there is no statutory requirement that it must be a utility before it may qualify for exemption from Commission regulation. H2Oulton also contends that Section 367.022(8), Florida Statutes, does not require that the reseller has to be the original purchaser.

These arguments by H2Oulton are both nonsensical. Section 367.011, Florida Statutes, provides that:

- (2) The Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates.
- (3) The regulation of utilities is declared to be in the public interest, and this law is an exercise of the police power of the state for the protection of the public health, safety, and welfare. The provisions of this chapter shall be liberally construed for the accomplishment of this purpose.

(emphasis supplied)

Clearly, the Commission's jurisdiction is over utilities. H2Oulton is attempting to perform functions of a utility, such as collecting deposits for service and discontinuation of service. Since H2Oulton is not, by definition, a utility, it cannot avail itself of the exemptions provided in Section 367.022, Florida Statutes, to utilities and cannot act in a fashion authorized for utilities by Chapter 367, be they regulated or exempt. The exemptions from Commission jurisdiction set out in Section 367.022 are available to those that would, but for that Section, be regulated as utilities. Further, regarding whether Section 367.022(8) requires the reseller to be the original purchaser, H2Oulton is not purchasing water, but is simply allocating the costs of that service. For these reasons, we find it appropriate to reject this exception.

D. Exception No. 4 - H2Oulton takes exception to the Hearing Officer's conclusion that it is trying to use the provisions of Chapter 367, Florida Statutes, or the rules implementing that Chapter, for authority to collect deposits or to discontinue service to tenants. H2Oulton states that its authority to collect deposits and to interrupt service for nonpayment is derived from its contract with the tenants as well as Subsection 672.609(1), Florida Statutes, which is the Chapter of the Uniform Commercial Code that regulates sales. H2Oulton states that it has merely incorporated the provisions of Chapter 25-30, Florida Administrative Code, for customer relations and service interruptions because they provide a "workable procedure which balances the rights of a consumer and the interests of a service provider."

The Hearing Officer's conclusion is that, since H2Oulton has persistently tried to come under the Commission's jurisdiction and to simultaneously gain an exemption from that jurisdiction, H2Oulton wishes to gain some indicia of approval or authority from the Florida Public Service Commission for its activities. The provision of water and wastewater utility services is under the exclusive jurisdiction of Chapter 367, Florida Statutes. This exclusive jurisdiction may only be overridden by an express provision to do so. Chapter 672 contains no such provision. Under these circumstances, we believe the Hearing Officer's conclusion to be the only reasonable conclusion. Accordingly, we find it appropriate to reject this exception.

Based upon our review of the record of this proceeding, we find the Hearing Officer's conclusions of law to be supported by competent, substantial evidence. Therefore, we find it appropriate to adopt in toto the Hearing Officer's conclusions of law and recommendation. Accordingly, H2Oulton's request for an exemption pursuant to Section 367.022(8), Florida Statutes, is hereby denied. Based on her conclusions of law, the Hearing Officer recommended and we agree, and hereby find, that H2Oulton shall immediately cease holding itself out as a utility. Since it is not a utility pursuant to Chapter 367, Florida Statutes, H2Oulton shall not avail itself of the provisions for collection of deposits and disconnection of service set forth in Chapter 25-30, Florida Administrative Code. H2Oulton shall not include in its contracts and advertising and promotional materials any reference to its having the powers of a utility or an exempt entity under Chapter 367, Florida Statutes. In order to protect the public interest, we

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hereby require H2Oulton to provide a copy of this Order to all customers with whom it has a current or pending submetering contract. Finally, H2Oulton's application for an exemption pursuant to Section 367.022(8), Florida Statutes, is hereby denied.

We also find it appropriate to require our Staff to distribute a copy of this Order and an application for a reseller exemption pursuant to Section 367.022(8) to each of the landlords who have contracted or are proposing to contract with H2Oulton Metering Systems, Inc. Also, our Staff shall send copies of this Order to any associations or organizations of landlords or others that may be in a position to contract with H2Oulton. This is so they may clearly understand this Commission's decision regarding H2Oulton's activities and that, if those landlords or others operate as utilities, they will be required to obtain an exemption or a certificate from this Commission.

There is no further action to be taken, therefore, this docket shall be closed upon the running of the time for filing for reconsideration.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that H2Oulton Metering Systems, Inc., is not a utility pursuant to Chapter 367, Florida Statutes, on the facts set forth in this application, and is, therefore, not entitled to exemption pursuant to Section 367.022(8), Florida Statutes. It is further

ORDERED that H2Oulton Metering Systems, Inc., shall cease holding itself out as a utility or as having the authority to collect deposits and terminate service pursuant to Chapter 367, Florida Statutes. It is further

ORDERED that this Order shall be distributed to all entities contracting with or proposing to contract with H2Oulton Metering Systems, Inc., as set forth herein. It is further

ORDERED that this docket shall be closed upon the running of the time for reconsideration.

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By ORDER of the Florida Public Service Commission this 27th
day of May, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)
SFS

by: Karl Hays
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.