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M E M O R A N D U M

JANUARY 8, 1998

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

FROM: DIVISION OF LEGAL SERVICES (FERGUSON, BRUBAKER) *SB*
 DIVISION OF WATER AND WASTEWATER (DEWBERRY, GILCHRIST) *AS*
 DIVISION OF ADMINISTRATION (SEWELL LAKE) *GC* *JS* *GS* *RP*

RE: DOCKET NO. ~~971622~~ SU - LANDMARK ENTERPRISES, INC., -
 INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST LANDMARK
 ENTERPRISES, INC., IN HIGHLANDS 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: JANUARY 20, 1998 - REGULAR AGENDA - INTERESTED PERSONS
 MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\971622.RCM

CASE BACKGROUND

Landmark Enterprises, Inc. (Landmark or utility) is a Class C Utility located in Highlands County which provides wastewater service to approximately 243 residential customers and 9 general service customers.

The utility failed to file its 1993 annual report with the Commission. By letter dated June 6, 1994, staff notified the utility that the Commission had not received its annual report for 1993 and to file it by June 30, 1994, or the matter would be referred to the Division of Legal Services. Staff received a letter from Mr. David S. Plank, vice president of Landmark Enterprises, Inc., dated June 30, 1994, along with the regulatory assessment fee payment for 1993. Mr. Plank stated that he would

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file the 1993 annual report by July 15, 1994. The utility neither requested an extension nor filed the annual report.

By letter dated April 12, 1996, staff notified the utility that the Commission had not received its annual report for 1994. Staff also notified the utility that \$1,528.29 in regulatory assessment fees plus penalty and interest of \$596.03 were due. Staff stated that if the annual report was not filed and the fees were not remitted by April 30, 1996, then the matter would be referred to the Division of Legal Services. The utility neither requested an extension nor filed the annual report or remitted the fees.

By letter dated June 20, 1996, staff notified the utility that the Commission had not received its annual report for 1995 and to file it by August 16, 1996, or the matter would be referred to the Division of Legal Services. Staff also provided a notice of delinquency to the utility dated April 15, 1996, for failing to remit the regulatory assessment fees for 1995. The utility neither requested an extension nor filed the annual report or remitted the fees.

By letter dated July 26, 1996, staff notified the utility that the Commission had not received its annual report for 1995 and to file it by August 16, 1996, or the matter would be referred to the Division of Legal Services.

By letter dated May 23, 1997, staff again notified the utility that a total of \$3,086.38 in regulatory assessment fees plus penalty and interest of \$1,448.80 were due for the years 1994 and 1995. The letter stated that if the amount owed was not remitted by June 2, 1997, then the matter would be referred to the Division of Legal Services. The utility neither requested an extension nor remitted the fees.

By letter dated June 3, 1997, staff notified the utility that the Commission had not received its annual reports for 1993 and 1994 and that if they were not filed by June 13, 1997, staff would recommend that the Commission initiate show cause proceedings.

The utility failed to file its 1996 annual report with the Commission. The utility did not request a 30-day extension. By

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letter dated July 28, 1997, staff notified the utility that the Commission had not received the utility's annual report for 1996, and that if the annual report was not filed by August 15, 1997, the matter would be referred to the Division of Legal Services.

By letter dated November 19, 1997, staff notified Mr. Plank that the utility's annual reports needed to be filed with the Commission by November 26, 1997.

On November 24, 1997, Mr. Plank contacted staff by telephone and stated that he would fax the annual reports to the Commission on Monday, December 1, 1997. He also stated that he would submit a letter stating that he had to secure refinancing to avoid bankruptcy along with the annual reports. Staff reiterated to Mr. Plank that if the utility did not respond by December 1, 1997, the Division of Legal Services would recommend that the Commission initiate a show cause proceeding against the utility and recommend further penalties in excess of the daily rate. Neither the fax nor the letter was received, and the reports were not filed.

This recommendation addresses the utility's failure to file its annual reports from 1993 to 1996 and its failure to remit regulatory assessment fees for 1994 and 1995.

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DISCUSSION OF ISSUES

ISSUE 1: Should Landmark be ordered to show cause why it should not remit a penalty in the amount of \$10,116 for failing to comply with Rule 25-30.110, Florida Administrative Code, in that it did not file its annual reports from 1993 to 1996?

RECOMMENDATION: Yes. Staff recommends that Landmark should be ordered to show cause, in writing, within 20 days why it should not remit a penalty in the amount of \$10,116 (\$4,173 for 1,391 days x \$3.00 per day for 1993; \$3,078 for 1026 days x \$3.00 for 1994; \$1,980 for 660 days x \$3.00 per day for 1995; and \$885 for 295 days x \$3.00 per day for 1996) for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual reports from 1993 to 1996. The show cause order should incorporate the conditions stated below in the staff analysis. Further, Landmark should immediately file the annual reports from 1993 to 1996, and should be put on notice that further violations of Rule 25-30.110, Florida Administrative Code, will result in further action by the Commission. (FERGUSON, DEWBERRY)

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. 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 C utilities is \$3.00 per day. Staff calculated the penalty based on the number of days elapsed since March 31 and the date of this agenda. The date of this agenda is included in computing the number of days elapsed. Staff notes that the penalty will still accrue until the utility files its annual reports. The Commission may impose lesser or greater penalties, pursuant to Rule 25-30.110(6)(c), Florida Administrative Code.

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As stated in the background, by letters dated June 6, 1994, April 12, 1996, June 26, 1996, July 26, 1996, June 3, 1997, July 28, 1997, and November 19, 1997, staff notified Landmark that since it had not filed its 1995 and 1996 annual reports, it was in apparent violation of Rule 25-30.110, Florida Administrative Code. The utility was directed to file both reports by November 19, 1997. The utility was given a final opportunity to file the annual reports by December 1, 1997.

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 Landmark be ordered to show cause, in writing, within 20 days why it should not remit a penalty in the amount of \$10,116 (\$4,173 for 1,391 days x \$3.00 per day for 1993; \$3,078 for 1026 days x \$3.00 for 1994; \$1,980 for 660 days x \$3.00 per day for 1995; and \$885 for 295 days x \$3.00 per day for 1996) for violation of Rule 25-30.110, Florida Administrative Code, by failing to file its annual reports from 1993 to 1996. Landmark should immediately file its annual reports from 1993 to 1996, and 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: Landmark's response to the show cause order must contain specific allegations of fact and law. Should Landmark 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

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before a final determination on 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 Landmark fails to file a timely response to the show cause order, the penalty is deemed assessed with no further action required by the Commission. In that event, if Landmark fails to respond to reasonable collection efforts by Commission staff, the collection of penalties should be referred to the Comptroller's office for further collection efforts. 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.

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ISSUE 2: Should Landmark be ordered to show cause within 20 days why it should not remit a statutory penalty in the amount of \$771.59 and interest in the amount of \$893.26 for violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to pay 1994 and 1995 regulatory assessment fees?

RECOMMENDATION: Yes. Staff recommends that Landmark should be ordered to show cause, in writing, within 20 days why it should not remit a statutory penalty in the amount of \$771.59 (\$382.07 for 1994 and \$389.52 for 1995) and \$893.26 (\$534.90 for 1994 and \$358.36 for 1995) in interest, for violation of Sections 350.113 and 367.145, Florida Statutes, and Rule 25-30.120, Florida Administrative Code, for failure to pay 1994 and 1995 regulatory assessment fees. Further, Landmark should be ordered to immediately remit \$1,528.29 and \$1,558.09 in outstanding regulatory assessment fees for 1994 and 1995, respectively, for a total regulatory assessment fee amount of \$3,086.38. The show cause order should incorporate the conditions stated below in the staff analysis. (BRUBAKER, SEWELL, LAKE, GILCHRIST)

STAFF ANALYSIS: In establishing 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 1994.

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.

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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 remit its regulatory assessment fees were mailed to the utility on April 12, 1996, and May 23, 1997. While Commission staff had several telephone conversations with Mr. Plank, no action was taken by the utility in response to either of these notices. As of January 31, 1998, the utility owes the following: \$1,528.29 in regulatory assessment fees, as well as \$382.07 in penalties and \$534.90 in interest for a total of \$2,445.26 for 1994; \$1,558.09 in regulatory assessment fees, as well as \$389.52 in penalties and \$358.36 in interest for a total of \$2,305.97 for 1995.

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

Since 1994, 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, why it should not remit penalties and interest in the amounts of \$382.07 and \$534.90, respectively, for 1994, and penalties and interest in the amounts of \$389.52 and \$358.36, respectively, for 1995, for its failure to remit its regulatory assessment fees. Further, Landmark should be

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ordered to immediately remit a total of \$3,086.38 in delinquent regulatory assessment fees for the years of 1994 and 1995.

Staff recommends that the show cause order incorporate the following conditions: Landmark's response to the show cause order must contain specific allegations of fact and law. Should Landmark 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 on 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 Landmark fails to file a timely response to the show cause order, the penalties and interest are deemed assessed with no further action required by the Commission. In that event, if Landmark fails to respond to reasonable collection efforts by Commission staff, the collection of fees, penalties, and interest should be referred to the Comptroller's office for further collection efforts. 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.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: If Landmark responds to the show cause order by filing the annual reports, paying 1994 and 1995 regulatory assessment fees, and remitting all associated penalties and interest, this docket should be closed administratively. If Landmark fails to timely respond to the show cause order and fails to respond to Commission staff's reasonable collection efforts, then this matter should be referred to the Comptroller's office for further collection efforts and this docket should be closed administratively. If Landmark responds to the show cause order and requests a hearing, this docket should remain open for final disposition. (FERGUSON, BRUBAKER)

STAFF ANALYSIS: If Landmark responds to the show cause order by filing the annual reports, paying 1994 and 1995 regulatory assessment fees, and remitting all associated penalties and interest, Staff believes that this docket should be closed administratively. If Landmark fails to timely respond to the show cause order and fails to respond to staff's reasonable collection efforts, then this matter should be referred to the Comptroller's office for further collection efforts and this docket should be closed administratively. If Landmark responds to the show cause order and requests a hearing, this docket should remain open for final disposition.