

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Clapp, Kaproth, Walden)
Office of the General Counsel (Sayler)

Handwritten initials and signatures: PPO, KK, JS, SW, CAPROTH, SAYLER, COLE

RE: Docket No. 090154-SU – Notice of abandonment of wastewater system for The Village of Lakeland Mobile Home Park in Polk County, by West Lakeland Wastewater, Inc.
County: Polk

AGENDA: 08/18/09 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\090154.RCM.DOC

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COMMISSION
CLERK

Case Background

West Lakeland Wastewater, Inc. (West Lakeland or utility) is a Class C wastewater utility currently serving approximately 300 customers in Polk County (County). This area is in the Southwest Florida Water Management District (SWFWMD) and is considered a water use caution area. Water service is provided by the City of Lakeland. The utility's 2006 annual report shows operating revenue of \$67,521 and net operating loss of \$34,442.

The utility, previously known as ABCA, Inc. (ABCA), has been providing service to customers in Polk County since 1972. On January 9, 1990, the Polk County Commission granted a franchise to Ameribanc Investors Group (Ameribanc) for a system known as Village

DOCUMENT NUMBER-DATE

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Lakeland. Polk County came under Commission jurisdiction on July 11, 1996. In 1998, the Commission granted the utility its grandfather Certificate No. 515-S for wastewater service.¹ ABCA's certificate was transferred to West Lakeland in 2001.²

By letter dated March 26, 2009, West Lakeland gave notice of abandonment effective June 30, 2009. The notice was issued to the Public Service Commission, the Board of County Commissioners of Polk County, and the Florida Department of Environmental Protection (DEP). Upon receiving the notice of abandonment, the Polk County Attorney's Office (County Attorney) started investigating options for the utility. On May 13, 2009, the County Attorney filed a Petition for Appointment of Receiver for West Lakeland Wastewater, Inc. in the Circuit Court of the Tenth Judicial Circuit (Circuit Court). The Circuit Court issued an order in Case No. 53-2009CA-005284, issued on June 22, 2009, in which it declared West Lakeland Wastewater, Inc. abandoned and appointed Mr. Michael Smallridge (Mr. Smallridge or receiver) as receiver of the wastewater system.

This recommendation is to acknowledge the abandonment of the utility and the appointment of Mr. Michael Smallridge as the receiver. The Commission has jurisdiction pursuant to Sections 367.165 and 367.071, Florida Statutes (F.S.).

¹ Order No. PSC-98-0752-FOF-SU, issued June 1, 1998, in Docket No. 971531-SU, In re: Application for grandfather certificate to operate wastewater utility in Polk County by ABCA, Inc.

² By Order No. PSC-01-1576-FOF-SU, issued July 30, 2001, in Docket No. 010382-SU, In re: Application for transfer of Certificate No. 515-S in Polk County from ABCA, Inc. to West Lakeland Wastewater, Inc.

Discussion of Issues

Issue 1: Should the Commission acknowledge the abandonment of the utility and the appointment of Mr. Michael Smallridge as receiver?

Recommendation: Yes, the Commission should acknowledge the abandonment of the utility and the appointment of Mr. Smallridge as receiver effective June 22, 2009, pursuant to Section 367.165, F.S. The territory previously approved for this utility is described in Attachment A. Certificate No. 515-S should remain effective. Pursuant to Rule 25-30.120, F.A.C., the receiver should file the utility's 2009 regulatory assessment fees. The resultant order should serve as West Lakeland's wastewater certificate and it should be retained by the utility. Pursuant to Rule 25-9.044(1), Florida Administrative Code (F.A.C.), the rates and charges approved for the utility should be continued until authorized to change by the Commission in a subsequent proceeding. (Clapp, Kaproth, Saylor)

Staff Analysis: Pursuant to Section 367.165(1), F.S., which requires a 60-day notice from the utility owner prior to abandonment, on March 26, 2009, officers of West Lakeland provided a 90-day notice of intent to abandon the utility. Consistent with Section 367.165(2), F.S., by order issued June 22, 2009, the Circuit Court declared the utility abandoned and appointed Mr. Michael Smallridge as the receiver as of June 22, 2009. The responsibility of the receiver is to operate the utility efficiently and effectively from the date of abandonment until disposition of the property.

With the appointment of the receiver, the utility is not owned or controlled by a governmental entity. Therefore, the utility will retain Certificate No. 515-S and will remain under Commission jurisdiction. The resultant order reflecting the change in ownership should serve as West Lakeland's wastewater certificate and it should be retained by the utility. The territory previously approved for this utility is shown on Attachment A.

Pursuant to Rule 25-30.090(3), F.A.C., within 10 days of the appointment of a receiver by the circuit court, the receiver shall request from the Commission a copy of the utility's tariff and most recent annual report. The receiver made a timely request and a copy of the utility's tariff and 2006 annual report were supplied to the receiver. The receiver has hired a licensed operator to run the system.

The utility's initial rates and charges were approved in Order No. PSC-98-0752-FOF-SU. In 2007, the utility applied for a limited proceeding to increase the wastewater rates to address the cost of meter reading and customer billing.³ All of the rates approved for the utility are shown on Attachment B. Pursuant to Rule 25-9.044(1), F.A.C., the rates and charges approved for the utility should be continued until authorized to change by the Commission in a subsequent proceeding.

According to DEP's Tampa office, there is no formal enforcement activity with this utility. At the time of the last inspection several months ago, there were a few minor details

³ Order No. PSC-08-0083-PAA-SU, issued February 13, 2008, in Docket No. 070466-SU, In re: Application for limited proceeding rate increase in Polk County by West Lakeland Wastewater, Inc.

needing attention. A significant item that will need to be addressed soon is renewal of the plant's operating permit, which expires November 29, 2009.

West Lakeland has outstanding regulatory assessment fees (RAFs) and associated penalties and interest. West Lakeland filed its 2006 annual report but has not the annual reports for 2007 and 2008. There are outstanding penalties for these annual reports. The annual reports and RAFs will be discussed in more detail in Issue 2. In accordance with Rule 25-30.110, F.A.C., Mr. Smallridge, as receiver, should be responsible for filing the 2009 annual report for the utility. Furthermore, in accordance with Rule 25-30.120, F.A.C., the receiver should file the utility's 2009 regulatory assessment fees.

Based upon the foregoing, staff recommends that the Commission should acknowledge the abandonment of the utility and the appointment of Mr. Smallridge as receiver effective June 22, 2009, pursuant to Section 367.165, F.S. The territory previously approved for this utility is described in Attachment A. Certificate No. 515-S should remain effective. The resultant order should serve as West Lakeland's wastewater certificate and it should be retained by the utility. Pursuant to Rule 25-9.044(1), F.A.C., the rates and charges approved for the utility should be continued until authorized to change by the Commission in a subsequent proceeding.

Issue 2: Should the Commission require the utility to show cause within 21 days, why it should not be fined for failure to pay regulatory assessment fees and file annual reports pursuant to Rules 25-30.110 and 25-30.120, F.A.C.

Recommendation: No. The Commission should decline to show cause the utility for failure to pay regulatory assessment fees and file annual reports now that it is in receivership, and request that the Department of Financial Services write off \$6,219.95 owed by the utility's former owners. (Sayler, Kaproth)

Staff Analysis: There are two show cause issues which will be discussed below: the utility's failure to pay its RAFs and to file annual reports.

Failure to pay regulatory assessment fees

RAFs are intended to cover the costs incurred in the Commission's regulation of utilities, and Section 367.145, F.S., requires water and wastewater utilities to remit RAFs to this Commission. Pursuant to Section 350.113(4), F.S., and Rule 25-30.120(7)(a), F.A.C., a statutory penalty plus interest shall be assessed against any utility that fails to timely pay its RAFs, in the following manner:

1. Five percent of the fee if the failure is for not more than 30 days, with an additional five 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 one percent for each 30 days or fraction thereof, not to exceed a total of 12 percent annum.

Payment of RAFs, plus associated penalties and interest, is required by Sections 367.145(1), and 350.113(3) and (4), F.S. Therefore, the Commission does not have the power to waive the requirement for payment of RAFs, associated penalties and interest. Pursuant to Sections 367.145(1)(b) and 367.161, F.S., and Rule 25-30.120(7)(b), F.A.C., the Commission may impose an additional penalty upon a utility for failure to pay RAFs in a timely manner.

West Lakeland made a partial payment of \$1,360.67 on May 31, 2008, for its 2007 RAFs, and no payment for its 2008 RAFs. Notices of delinquency for failure to remit the 2007 and 2008 RAFs were mailed to West Lakeland on April 22, 2008, and April 15, 2009, respectively. As of the date of receivership, June 22, 2009, the utility owed delinquent RAFs for 2007 and 2008, respectively: \$3,961.53 in RAFs, \$856.62 in interest, and \$312.80 in penalties. The amount of 2009 RAFs owed from January 1, 2009, through June 22, 2009, is \$1,315.17; however, this amount will be the responsibility of the receiver.⁴

⁴ See Order No. PSC-95-0222-FOF-WU, issued February 17, 1995, in Docket No. 941122-WU, In Re: Notice of abandonment of water system in Levy County by Manatee Utilities, Inc.

Failure to submit annual reports

Pursuant to Rule 25-30.110, F.A.C., the filing of annual reports with the Commission is required. Any utility which fails to file an annual report within the specified timeframe, pursuant to Rule 25-30.110(7), F.A.C., shall be subject to a penalty of \$3.00 per day for Class C utilities. Here, West Lakeland failed to file its required 2007 and 2008 annual reports. Because West Lakeland is a Class C utility, the amount due is \$840 for failing to file the 2007 report, and \$249 for the 2008 report.⁵

The total amount owed by West Lakeland for RAFs, associated penalties and interest, and annual report penalties, is \$6,219.95. This amount is calculated through June 22, 2009, the date of receivership.

Section 367.161(1), F.S., authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, F.S. Because West Lakeland has failed to pay its RAFs since May 31, 2008, and has not submitted its required annual reports, the utility is apparently in violation of Chapter 367, F.S.

Utilities are charged with the knowledge of Commission 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 pay RAFs, 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.

The failure to pay RAFs and file annual reports is an apparent violation of Section 367.145(1)(b), F.S. On June 23, 2009, staff contacted one of the former owners by phone about the RAFs owed, and he stated the utility was broke and unable to pay its debts. On June 24, 2009, staff contacted the former owners by letter and electronic mail about the RAFs and annual reports they failed to submit, seeking information about why they failed to submit RAFs and annual reports to the Commission. To date, they have not responded.

The law, as indicated above, is clear that the Commission does not have the discretion to waive the assessment of RAFs and the associated penalties and interest, nor to waive them.⁶ The requirement for RAFs, plus penalty and interest, is by statute, and not by rule, and a waiver is therefore not appropriate. With regards to annual report penalties, Section 367.121(1)(c), F.S.,

⁵ Because the utility had requested an extension to file, the amount due for the 2007 annual report was calculated from September 15, 2008, until June 22, 2009, the date of receivership. The amount due for the 2008 annual report was calculated from March 31, 2009, until June 22, 2009.

⁶ See Order No. PSC-96-0834-FOF-WS, issued July 1, 1996, in Docket No. 960540-WS; Order No. 24290, issued March 26, 1991, in Docket No. 900961-SU; and Order No. PSC-97-0767-FOF-FU, issued June 30, 1997, in Docket No. 970360-GU.

authorizes the Commission to require annual reports, but does not require penalties for non-compliance. Penalties imposed for delinquent annual reports are imposed pursuant to Rule 25-30.110(6) and (7), F.A.C. Pursuant to Rule 25-30.110(6), F.A.C., a utility will be subject to a penalty unless it can demonstrate good cause for its non-compliance.

Staff notes that while the utility is liable for the RAFs, interest and penalties, and any penalties associated with failing to file annual reports, in this case, it would be the former owners who are liable. According the Circuit Court's Order on Petition for Appointment of Receiver for West Lakeland Wastewater, Inc., dated June 22, 2009, "Respondents, Sam Averett and Suzzane Britt, [utility's former owners,] shall remain liable under all applicable laws for any claims, violations, penalties, suits, proceeding, actions or fees occurring prior to the appointment of the Receiver." As such, the former owners are liable to the Commission for past due amounts.

Because the former owners abandoned the utility, the likelihood that the former owners will pay the past due RAFs, penalties and interest, annual report penalties, or any other amounts due the Commission is minimal without much time, energy, and effort expended by Commission staff in attempting to collect them. Staff contacted the former owners about the past due amounts; however, the former owners responded they did not have the money. In addition, they failed to respond to staff's letter seeking an explanation of why they did not pay. Their abandonment of the utility, along with their verbal response and failure to subsequently respond to staff inquiries, are all indications that the former owners will not pay any outstanding RAFs, penalties and interest, annual report penalties, or any other amounts due the Commission.

In consideration of the foregoing, staff recommends that any attempt to collect the RAFs, plus associated penalties and interest, and annual report penalties, through a show cause proceeding would almost certainly be a waste of time, money, and effort. It appears that further collection efforts would not be cost-effective and that collection of any fees is highly unrealistic. Therefore, consistent with Commission practice,⁷ staff recommends that the Commission decline to initiate show cause proceedings against the utility or its former owners for its apparent violation of the aforementioned statutes and Commission rules, and direct staff to refer West Lakeland's unpaid RAFs for 2007 and 2008 and associated penalties and interest to the Department of Financial Services for permission to write off the account as uncollectible. Because the utility was abandoned and is now in receivership, Staff also recommends that the Commission find good cause for the utility's non-compliance, exercise its discretion in Rule 25-30.110(6), F.A.C., and not assess the penalties set forth in Rule 25-30.110(7), F.A.C., for outstanding annual reports.

⁷ See Order No. PSC-03-0550-FOF-WS, issued April 28, 2003, in Docket No. 030289-WS, In re: Disposition of delinquent regulatory assessment fees and delinquent annual report and penalties for Sports Shinko Utility, Inc. d/b/a Grenelefe Utilities in Polk County.

Issue 3: Should this docket be closed?

Recommendation: Yes. If the Commission approves Staff's recommendation, upon referral of the unpaid regulatory assessment fees, penalties, and interest to the Department of Financial Services regarding authority to write off the account as uncollectible, this docket should be closed administratively. (Sayler, Clapp)

Staff Analysis: If the Commission approves Staff's recommendation, upon referral of the unpaid regulatory assessment fees, penalties, and interest to the Department of Financial Services regarding authority to write off the account as uncollectible, this docket should be closed administratively.

West Lakeland Wastewater, Inc.
Polk County
Description of Wastewater Territory

Village Lakeland
Sections 14 and 23, Township 28 South, Range 24 East

Beginning at the SW corner of Section 14, Township 28 South, Range 24 East; run thence East along the South boundary of said Section 14 to the SE corner of the SW 1/4 of the SW 1/4 of said Section 14; thence North to the NW corner of the South 1/2 of the SE 1/4 of the SW 1/4 of said Section 14; thence East to the NE corner of said South 1/2 of the SE 1/4 of the SW 1/4; thence South along the East boundary of the West 1/2 of said Section 14 and the East boundary of the West 1/2 of Section 23 of said Township and Range to the SE corner of the NW 1/4 of said Section 23; thence East to the NE corner of the West 1/4 of the SE 1/4 of said Section 23; thence South to the SE corner of said West 1/4 of the SE 1/4; thence West along the South boundary of said Section 23 to a point 220 feet West of the SE corner of the SW 1/4 of said Section 23; thence North 1,247.05 feet, West 100 feet, North 600 feet, West 180 feet, North 500 feet, West to the West boundary of the East 1/2 of the SW 1/4 of said Section 23; thence North along said West boundary of said East 1/2 of said SW 1/4 and along the West boundary of the SE 1/4 of the NW 1/4 of said Section 23 to the NW corner of said SE 1/4 of the NW 1/4; thence West along the South boundary of the NW 1/4 of the NW 1/4 of said Section 23 to the West boundary of said Section 23; thence North along said West boundary to the point of beginning.

FLORIDA PUBLIC SERVICE COMMISSION
authorizes
West Lakeland Wastewater, Inc.
pursuant to
Certificate Number 515-S

to provide wastewater service in Polk County in accordance with the provisions of Chapter 367, F.S., and the Rules, Regulations, and Orders of this Commission in the territory described by the Orders of this Commission. This authorization shall remain in force and effect until superseded, suspended, cancelled or revoked by Order of this Commission.

<u>Order Number</u>	<u>Date Issued</u>	<u>Docket Number</u>	<u>Filing Type</u>
PSC-98-0752-FOF-SU	06/01/98	971531-SU	Grandfather Certificate
PSC-01-1271-PAA-SU	06/06/01	010382-SU	Transfer
PSC-01-1576-FOF-SU	07/30/01	010382-SU	Name Change
*	*	090154-SU	Receiver Appointed

***Order Number and date to be provided at time of issuance.**

West Lakeland Wastewater, Inc.
Monthly Wastewater Service Rates

Residential Service

Meter Size:

5/8" x 3/4"	\$ 13.39
Gallage Charge Per 1,000 Gallons (8,000 Gallon Cap)	\$ 3.26

General Service

Meter Size

5/8" x 3/4"	\$ 13.39
1"	\$ 18.29
1 1/2"	\$ 28.09
2"	\$ 52.61
3"	\$ 82.02
4"	\$ 160.45
6"	\$ 248.71
8"	\$ 493.82
Gallage Charge Per 1,000 Gallons	\$ 3.89

Miscellaneous Service Charges

Initial Connection Fee	\$ 15.00
Normal Reconnection Fee	\$ 15.00
Violation Reconnection Fee	Actual Cost
Premises Visit Fee	\$ 15.00

Service Availability Charges

Tap-in Fee	\$ 880.00
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