

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Application of Consolidated Services of Hendry & Collier, LLC, for original water and wastewater certificates in Hendry and Collier Counties, Florida. )  
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Docket No. 130105-05

PETITION FOR VARIANCE FROM OR WAIVER  
OF RULES 25-30.033(1)(h),(1)(m), (1)(o), (1)(t),(1)(u), (1)(v), (1)(w)

Consolidated Services of Hendry & Collier, LLC, ("Consolidated Services"), by and through its undersigned counsel and pursuant to Section 120.542, Florida Statutes, moves this Commission for a temporary variance from or waiver of certain rule requirements, and in support thereof, states:

1. Consolidated Services, as referenced in its Application for Original Water and Wastewater Certificates (the application), requests that the Commission temporarily vary or waive certain aspects of the certification rule. The rules requested to be temporarily varied or waived all require the submittal of information upon which initial rates may be designed. This temporary variance or waiver request is made so that Consolidated Services may obtain its certificate in a cost effective and expeditious manner without the submittal of data which will be available and submitted prior to the implementation of rates, fees, or charges in a more precise and accurate manner than would be presently possible.

2. Each variance or waiver requested herein below is acknowledged to be a temporary variance or waiver.<sup>1</sup> Indeed, this Motion is premised upon Consolidated Services' clear understanding that, prior to the implementation of any rates, fees, charges, or the provision of service as defined by Commission rule and Chapter 367, Consolidated Service will provide the

<sup>1</sup> This Petition is filed in the alternative so that the Commission may characterize the requested three year deferral of the submittal of the information as it deems fit – as a temporary waiver of the rules or as a variance from the rules.

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information for which the variance or waiver is sought hereunder. The long range planning necessary to transition the properties proposed to be certificated is substantially underway. A significant portion of the land in Hendry County proposed to be certificated is located within the southwest Hendry County Sector Plan. A sector plan is a devise within Florida law that recognizes the benefits the long-range planning for specific areas and empowers local governments or combinations of local governments to adopt into their comprehensive plans sector plans. The sector plan is intended to promote and encourage long-term planning for conservation, development and agriculture on a landscape sale; to further support innovative and flexible planning and development strategies; and to facilitate protection of regionally significant resources. Sector plans are intended for substantial geographic areas that include at least 15,000 acres of one or more local governmental jurisdictions and are to emphasize urban form and protection of regionally significant resources in public facilities. *See, eg*, §163.3245(1), Florida Statutes. Consolidated Citrus Limited Partnership ("Consolidated Citrus") worked closely with Hendry County in drafting the Plan.

The property owned by Consolidated Citrus in Collier County is part of the Rural Land Stewardship Program. The Rural Land Stewardship Program in Collier County is intended to encourage smart growth patterns in rural areas of the county per the County's Growth Management Plan. Consolidated Citrus worked closely with Collier County in drafting the Plan.

As referenced in the letter from Mr. Charles Lucas, the President of Consolidated Citrus, significant activities which will require the production and provision of potable water and wastewater service are in the active planning stage. These planned activities are in addition to the currently existing facilities referenced in the same letter. Consolidated Services wishes to implement the initial phases of service in a uniform and cost-efficient manner.

Accordingly, this deferral is requested only for a period of 36 months from the granting of the certificate, should it be necessary that the establishment of rates by the PSC is necessary before that time, Consolidated Citrus will file the appropriate request with the PSC.

3. The legislature has declared in the Florida Administrative Procedure Act that strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. See, §120.542(1), Fla. Stat. That provision authorizes the PSC to grant a variance or waiver to the requirements in its rules, and to impose conditions on any such grant to the extent necessary such that the purpose of the underlying statute can be achieved. Variances and waivers should be granted when the party requesting variance or waiver demonstrates that the purpose of the underlying statute will be or has been achieved by other means by that party and when application of the rule would create a substantial hardship. See §120.542(2), Fla. Stat. Substantial hardship can include a demonstrated technological, legal, economic, or other type of hardship to the party requesting the variance or waiver. §120.542(2), Fla. Stat.

4. The application of the rules sought to be varied or waived would create a substantial hardship for Consolidated Services. There are several things which the Commission should keep in mind in review of this Petition:

- (a) There is a dearth of authority as to what constitutes a hardship under §120.542(2);
- (b) The word "substantial" should not be read with more gravity than is appropriate - the word substantial simply means "consisting of or relating to substance" and "not imaginary or illusory";
- (c) The word "hardship" should not be given any more gravity in this context as is appropriate.

(d) "Economic results" (that in the context of the phrasing of the statute indicate economic results which are neither imaginary nor illusory) were specifically included as an example of a substantial hardship by the legislature in the statute.

(e) The original intent of the Governor's select committee (who originally crafted this statutory provision) was to allow petitioners to demonstrate that the statutory criteria can be accomplished by other means, therefore recognizing the concept of a "better mouse trap". The "better mouse trap" concept was frequently used by Commissioners during discussions of the proposed changes to describe the idea of allowing those dealing with agencies to develop their own means of accomplishing statutory requirements. See, *Governor's Administrative Procedure Act Revision Commission, Final Report, Note 6 Appendix D, at 1.*

What is clear, from the language of the statute itself, is that this provision was implemented to avoid the strict application of the rule at issue in any way which would "lead to" an "unreasonable" or "unintended" result. See, §120.542(1).

5. If this request for temporary variance or waiver is granted, the purpose of the underlying statutes, §367.031 and §367.045, will still be achieved. The purpose of those statutes is to ensure that a utility has the financial and technical ability to provide service and that there is a need for service in the proposed service area. See, e.g., *In re: Application for certificate to operate water and wastewater utility in Marion County by Ocala Springs Utilities, Inc.; Order no. PSC-98-1374-PCO-WS*. These demonstrations are made within the application of Consolidated Services and no variance or waiver to any rule relating to these two categorical requirements is requested. The setting of the initial rates, fees and charges for utilities who are imminently engaged in negotiations with developers or interactions with non-related customers is obviously a critical function of the Commission and is clearly in the public interest. However, the conceptual design of such rates, fees and charges, based upon facilities, configurations, and a service implementation

schedule which is unlikely to be realized is not in the public interest and is, contrarily, a drain on the resources of the applicant and the Commission. The recognition of this fact, in the unique case of the large landowner, is in no way a shirking of the Commission's statutory mandate and responsibilities. Rather it is an acknowledgement that these types of applications, and these applicants, are unique and that they should be reviewed and evaluated accordingly. Quite simply, and to state the obvious: Planning the transition of nearly 24,000 acres of Florida real estate, and envisioning the future of how the lands will be utilized, the types of demands that may arise for the properties and their related utilities, and how the population, the economy and even the regulatory framework under which the properties will operate into the future is a demanding and difficult endeavor. The public interest can still be served, the Commission's mandate can still be fulfilled, and the long range and short term planning of Consolidated Citrus and Consolidated Services can still be facilitated, without the unnecessary incurrence of expenses and expenditure of resources.

6. In this case, bifurcation such that rate setting may be deferred for three years will avoid an unreasonable commitment of money and resources; and will lead to more reliable and accurate rates (which is certainly the result intended by Chapter 367); and will, in all likelihood, avoid the possibility that a second application for adjusted, modified, or different rates would need to be filed prior to operation or in the first few years of operations of the utility. In this instance, as it often the case with similarly situated applications for original certificates from large landowners, the proposal and review of specific rates, fees, or charges at this time would be based, at best, on estimated and projected expenses. The generation of such estimated and projected rates, fees, or charges would be expensive and onerous, occupying the time and resources of utility as well as the time and resources of the Commission's staff. The variance or waivers requested hereinbelow would relieve utility of an economic hardship, and an unnecessary expenditure of time and effort by Consolidated Services and the Commission staff, in each case resulting in a speculative and in all

probability unrealistic outcome. The underlying statutory purpose for the rules from which variance or waiver is sought can be achieved by other means – to wit: direction from the Commission that the information necessary for the setting of rates, fees, and charges shall be filed with the Commission and properly reviewed by the Commission staff, and an order issued by the Commission establishing such rates, fees, or charges shall exist prior to the implementation of service by Consolidated Services. For all of the reasons set forth in the application, Consolidated Services requests the certificates for which it has applied. The denial of the certification will deprive Consolidated Services of those operational and planning benefits which the certificates will provide. Such deprivation of the certificates to an entity qualified to hold the certificates pursuant to Chapter 367 is a hardship in and of itself. To require (at this time as part of this submittal) the creation and submittal of that information for which deferral is requested will result in the likely requirement that the rates be recalculated upon redesigned facilities upon reestablished costs prior to the rendering of service. This can only constitute a hardship (which is neither imaginary nor illusory) and can only result in "unintended" and "unreasonable" results, which is exactly what §120.542 was designed to prevent.

7. The Commission has found that variance or waiver of those provisions of the certification rule that require the filing of information which is needed to set rates does not prevent the Commission from determining whether the key provisions of the certificate rule are met. The Commission has found, in such cases, that "rates can be set at a later date, and often are". See *In re: Application for certificate to provide wastewater service in Lee and Charlotte Counties by Town and Country Utilities Company*, Order No. PSC-07-0076-PAA-SU (2007). While not everything about the *Town and Country* Order is analogous to this application, the Order (and the three PSC Orders cited in footnote 4 therein) is illustrative. Similar to the circumstance in this case, Central Sumter Utility Company requested, in 2005, that the certification and rate setting aspects of the case

be bifurcated and that the Commission grant a temporary variance from or waiver of several requirements of Rule 25-30.033, Florida Administrative Code. See, Order No. PSC-05-0844-PAA-WS, page 2. The Commission, in granting the requested temporary rule variance or waiver, noted that Central Sumter would be able, at a future date, to provide accurate cost estimates, schedules, and cost studies to support initial rates and charges and found that Central Sumter had otherwise demonstrated that it had the financial and technical ability to provide service. Noting that Central Sumter had requested a waiver of its rules until the utility received other permits and was "closer to commencing operations", and in reliance upon Central Sumter's representation that it would file its proposed tariffs and other required financial schedules to set initial rates sufficiently in advance of beginning operations, so that the Commission would have time to review the proposed rates. The Commission found that the temporary waiver was appropriate until permitting was completed and Central Sumter was "closer to commencement of operations". Order No. PSC-05-0844-PAA-WS at page 4. In fact, the Commission did not issue its Consummating Order approving Central Sumter's initial rates and charges until March of 2011, five years later. See Order No. PSC-11-0163-CO-WS. In none of the cases referenced herein above was the public interest adversely affected, nor the purposes of Chapter 367 thwarted, nor circumvented by the Commission's grant of the temporary rule variances or waivers requested in each instance. Similarly, Consolidated Services' requested temporary rule variance or waiver should be granted by this Commission and such grant will be consistent with the public interest and the purpose and intent of Chapter 367.

8. Consolidated Services requests a temporary variance from or waiver of the requirements of the following rules:

25-30.033 (1) (h) – Information regarding the ERCs to be served.

25-30.033 (1) (m) - A copy of a detailed system map.

25-30.033 (1)(o) - A statement regarding the capacities of proposed lines and facilities.

25-30.033 (1) (t) - A cost study supporting proposed rates and changes.

25-30.033 (1) (u) - A schedule showing the projected cost of the system.

25-30.033 (1) (v) - A schedule showing projected operating expenses.

25-30.033 (1) (w) - A schedule showing the projected capital structure.

9. While Consolidated Services has requested a variance from or waiver of the requirements of Rules 25-30.033(1)(h) which requires submittal of "*the number of equivalent residential connections (ERCs) proposed to be served by meter size and customer class. If development will be in phases, separate this information by phase*", Consolidated Services has provided planning parameters, including the land use types and dwelling unit count anticipated at this time (see Exhibit "A", p. 21). Consolidated Services is unable at this time to provide the number of ERCs by meter size and customer class. Consolidated Services will be able to provide such additional data in conjunction with its submittal of the rate-setting information at the appropriate time.

10. Rule 25-30.033(1)(m) requires a detailed system map showing the proposed lines, treatment facilities and the territory proposed to be served. While planning is currently underway, the locations of such lines and facilities have not yet been determined. Consolidated Services will be able to provide a system map in compliance with the Commission's requirements no later than the submittal of the rate-setting information at the appropriate time.

11. Rule 25-30.033(1)(o) requires submittal of "*a statement regarding the separate capacities of the proposed lines and treatment facilities in terms of ERCs and gallons per day. If development will be in phases, separate this information by phase.*" While Consolidated Services has requested temporary variance from or waiver of this rule, the application does describe the type and nature of the anticipated treatment facilities (see Exhibit "C", p. 23-24). Consolidated Services



is unable, at this time, to provide such data for its proposed lines or to project with specificity its treatment plant capacity information in terms of ERCs because the facilities are yet to be designed or permitted. Indeed, that is why this rule is requested to be varied or waived. Consolidated Services will be able to provide such additional data in conjunction with its submittal of the required rate-setting information at the appropriate time.

12. Rule 25-30.033(l)(t), (u), (v) and (w) require a cost study supporting the proposed rates and charges; a schedule showing the projected costs for the system; a schedule showing projected operating expenses; and a schedule showing the projected capital structure, respectively. That information is not currently available with finality, and it is in the interest of the Commission and Consolidated Services that this information be submitted, as such time as it can be gathered and determined with a greater degree of accuracy, prior to the implementation of any rates, fees, or charges for the provision of any service.

13. In no way does this request for a temporary deferral in rate setting deprive the Commission of any of its authority to fulfill its obligation to set and control Consolidated Services' rates, fees, and charges. In point of fact, temporary deferral of the establishment of rates, fees, and charges for Consolidated Services will ensure that the initial assessments by the utility (upon the commencement of service) will be based on contemporaneous costs, plans for service, and economic conditions which are premised upon the most precise information and projections possible.

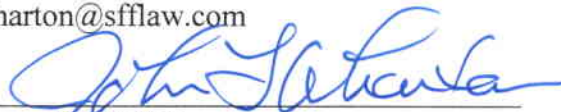
WHEREFORE, Consolidated Services requests this Commission enter an Order temporarily varying or waiving those certain requirements of Rules 25-30.033 (1) as requested herein.

Respectfully submitted this 29th day of April 2013, by:

SUNDSTROM, FRIEDMAN & FUMERO, LLP  
2548 Blairstone Pines Drive  
Tallahassee, Florida 32301

(850) 877-6555/(850) 656-4029 FAX

jwharton@sflaw.com



JOHN L. WHARTON

ATTORNEY FOR CONSOLIDATED SERVICES

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy was furnished on the 29th day of April, 2013, by U.S. Mail to the following:

Clerk of the Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Joint Administrative Procedures Committee  
Room 120  
The Holland Building  
Tallahassee, Florida 32399-1300



JOHN L. WHARTON