

FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

MEMORANDUM

APRIL 30, 1998

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FPSC - Records/Reporting

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

FROM: DIVISION OF LEGAL SERVICES (FERGUSON) *GFH*
DIVISION OF WATER AND WASTEWATER (DEWBERRY) *YAS*

RE: DOCKET NO. 980099-WU - INITIATION OF SHOW CAUSE
PROCEEDINGS AGAINST EAST MARION WATER DISTRIBUTION,
INC. IN MARION COUNTY FOR FAILURE TO FILE 1996 ANNUAL
REPORT IN ACCORDANCE WITH RULE 25-30.110(3), F.A.C.

AGENDA: MAY 12, 1998 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: 90 DAY STATUTORY TIME LIMIT - JULY 6, 1998

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\980099-R.RCM

CASE BACKGROUND

East Marion Water Distribution, Inc., (East Marion or utility) is a Class C water utility operating in Marion County. According to the 1991 annual report, East Marion provides water service to two customers with approximately \$750 in operating revenues. The system was inactive from 1992 until 1995.

According to the utility's application for transfer of majority organizational control, in Docket No. 971269-WS, the contract for sale and purchase of land and the utility between the First Bank of Osceola, the transferor, and Mr. Herbert Hein, the transferee, was executed on February 21, 1995.

Neither the contract for sale nor the application stated that the sale was contingent upon the Commission's approval. Because Mr. Hein had ownership and/or control of the utility and has been operating the utility since May of 1995, staff directed requests

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for payment of regulatory assessment fees and filing annual reports for 1995 forward to Mr. Hein's agent, Mr. Len Tabor. Because the utility's renewed activity, Commission staff requested that the utility file its annual report for 1996.

The utility filed its 1996 annual report on February 2, 1998, and staff determined that there were no deficiencies. By letter dated March 10, 1998, the utility was notified that the total penalty for untimely filing its 1996 annual report was \$741 (247 days x \$3.00 per day) and that payment was due by March 30, 1998. On March 10, 1998, staff was contacted by Mr. Hein, regarding the possibility of filing a petition for rule waiver or variance of the rule with respect to the penalties. Staff then forwarded information regarding filing a petition for rule waiver via facsimile. Staff sent a follow-up letter to Mr. Hein on March 31, 1998, to determine what actions the utility would undertake to comply with the Commission rule. On April 6, 1998, the utility filed a petition for rule waiver of Rule 25-30.110(6)(c) and (7), Florida Administrative Code.

The transfer of majority control is being handled separately in Docket No. 971269-WS. This recommendation addresses whether the Commission should grant the utility's petition for rule waiver of the penalties for late filing of its 1996 annual report and to waive the requirement to file its 1995 annual report.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant East Marion's petition for rule waiver of Rule 25-30.110(6)(c) and (7), Florida Administrative Code?

RECOMMENDATION: Yes, the Commission should grant East Marion's petition for rule waiver of Rule 25-30.110(6)(c) and (7), Florida Administrative Code, because the petition meets the requirements of Section 120.542, Florida Statutes. (FERGUSON, DEWBERRY)

STAFF ANALYSIS: As stated in the background, pursuant to Rule 25-30.110, Florida Administrative Code, Commission staff requested that the utility file its 1995 and 1996 annual reports. On April 6, 1998, East Marion filed a petition for rule waiver of Rule 25-30.110(6)(c) and (7), Florida Administrative Code. The utility seeks a waiver because it believes the underlying purpose of the statute has been served in that the utility filed its 1996 annual report on February 2, 1998. Staff determined that the utility's 1996 annual report was not deficient, thus the report was in compliance with Rule 25-30.110(6)(c) and (7), Florida Administrative Code. To date, the 1995 annual report has not been filed.

The utility believes that the application of the rule would create a substantial hardship on its operations. In East Marion's petition, the utility states that the previous owners died and the previous records were otherwise nonexistent. The utility also states that First Bank of Osceola, the interim owner of East Marion, did not maintain records on the utility. East Marion's new owner, Mr. Hein, nevertheless hired a certified public accountant to prepare the 1996 annual report. East Marion has also timely filed its annual report for 1997. Further, the utility has incurred losses of \$16,862 for 1996 and \$15,024 for 1997. The utility also states that if the Commission ordered the utility to file a 1995 annual report, the order "would only serve to increase the operating losses of the company and absorb funds needed to keep East Marion operational." Finally, East Marion's petition states that little purpose would be served in requiring the utility to file its 1995 annual report as the utility only renewed activity in 1996 and the pertinent information is contained in its 1996 and 1997 annual reports.

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The underlying statutes pertaining to the rule in this instance are Sections 367.121(1)(c), and 367.161(2) Florida Statutes. Section 367.121, Florida Statutes, provides that the Commission shall require regular reports from utilities under its jurisdiction consistent with the uniform system and classification of accounts and may require preparation of the reports by a certified public accountant. Rule 25-30.110(3)(a), Florida Administrative Code, which requires utilities subject to the Commission's jurisdiction to file an annual report on or before March 31 of the following year, implements Section 367.121, Florida Statutes. Section 367.161(2), Florida Statutes, provides that the Commission has the power to impose penalties on utilities under its jurisdiction who have refused to comply or wilfully violate Florida Statutes, Commission rules, or orders. Rule 25-30.110(6)(c) and (7), Florida Administrative Code, which provides for penalties of \$3.00 per day for a Class C utility for failure to timely file its annual report, implements Section 367.161, Florida Statutes. The purpose of requiring payment of penalties for late filing is to ensure compliance with Florida Statutes and Commission rules.

Section 120.542(2), Florida Statutes, in pertinent parts, provides that "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and that application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, substantial hardship means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver."

Staff believes that the utility has demonstrated a substantial technological and economic hardship in that the current owner bought the utility in 1995. The previous owners of the utility died and the records of the utility were not maintained by the interim owner. The new owner hired a certified public accountant and had the 1996 annual report prepared. Also, the utility is continuing to lose money. Ordering the new owner to remit the penalties for untimely filing its 1996 annual report and to spend the money to prepare a 1995 annual report would only add to the substantial economic hardship of the utility.

Staff also believes that the underlying purpose of the statute has been achieved. The utility filed its 1996 annual report as

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well as timely filed its 1997 annual report. Records on the utility's operations were not maintained when the new owner acquired the utility in 1995. Because the Commission now has the relevant information regarding the utility's operations pursuant to Florida Statutes and Commission rule, the underlying purpose of the statute has been achieved.

Pursuant to Section 120.542(6), Florida Statutes, on April 6, 1998, the Commission provided notice to the Department of State, which published notice of the waiver request in the Florida Administrative Weekly. After reviewing the petition, staff found no deficiencies. The Commission did not receive any comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, the Commission is required to issue an order in writing granting or denying the petition for waiver or variance stating the relevant facts and reasons supporting the Commission's decision within 90 days after receipt of the original petition.

Based on the foregoing, staff believes that East Marion's petition for rule waiver should be granted because the utility has demonstrated that a waiver of Rule 25-30.110(6)(c) and (7), Florida Administrative Code, would serve the underlying purpose of Sections 367.121 and 367.161 Florida Statutes, and the application of the rule would create a substantial hardship for the utility.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed if no person whose interests are substantially affected by the proposed action, files a protest within the 21-day protest period. (FERGUSON, DEWBERRY)

STAFF ANALYSIS: This docket should be closed if no person whose interests are substantially affected by the proposed action, files a protest within the 21-day protest period.