



# Public Service Commission

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**DATE:** SEPTEMBER 10, 1998

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

**FROM:** DIVISION OF LEGAL SERVICES (MCRAE, CROSBY),  
DIVISION OF WATER AND WASTEWATER (BRADY, REDEMANN)

**RE:** DOCKET NO. 980876-WS - APPLICATION FOR CERTIFICATE TO OPERATE WATER AND WASTEWATER UTILITY IN MARION COUNTY BY OCALA SPRINGS UTILITIES INC.

**AGENDA:** SEPTEMBER 22, 1998 - REGULAR AGENDA - PROPOSED AGENCY ACTION RULE WAIVER - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** OCTOBER 28, 1998 - COMMISSION MUST GRANT OR DENY WITHIN 90 DAYS OF RECEIPT OF PETITION

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\980876.RCM

### CASE BACKGROUND

On July 13, 1998, Ocala Springs Utilities, Inc., (OSUI) submitted an application for original certificates to operate a water and wastewater utility in Marion County, Florida along with a petition requesting a temporary variance from or a temporary waiver of Rules 25-30.033(1)(h), (j), (m), (o), (r), (t), (u), (v), (w), (2) and (3) and 25-30.433(10), Florida Administrative Code. On July 31, 1998, the utility filed an amended petition requesting a temporary variance from or temporary waiver of Rules 25-30.033(1)(k) and (4), Florida Administrative Code, in addition to the above-mentioned rules.

OSUI is a wholly-owned subsidiary of Avatar Utilities, Inc., (Avatar), which is a wholly-owned subsidiary of Avatar Holdings, Inc., (Avatar Holdings). Avatar's other operating subsidiaries include Florida Cities Water Company which serves customers in six

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Florida communities and Poinciana Utilities, Inc., which provides service to customers in Osceola and Polk Counties.

OSUI has been created for the specific purpose of providing water and wastewater service to Ocala Springs which is planned to be an active adult community. Avatar Holdings owns all the land, consisting of 4,666 acres, included within the boundary of Ocala Springs.

This recommendation addresses the petition and amended petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code. A recommendation concerning whether a certificate should be issued will be filed for a subsequent Agenda Conference.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant Ocala Springs Utilities, Inc.'s amended petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code?

**RECOMMENDATION:** Yes. Staff recommends that the Commission grant Ocala Springs Utilities, Inc.'s amended petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code, because the petition meets the requirements of Section 120.542, Florida Statutes. (MCRAE, CROSBY)

**STAFF ANALYSIS:** Rules 25-30.033(1)(h), (k), (o), (r), (t), (u), (v), and (w), Florida Administrative Code, pertain to the establishment of rates and charges and require the utility to submit: information regarding the number of equivalent residential connections proposed to be served; one original and two copies of a sample tariff containing all rates, classifications, charges, rules, and regulations; a statement regarding the capacities of the proposed lines and treatment facilities; a statement of the financial condition of the applicant; a cost study supporting the proposed rates, charges, and service availability charges; schedules showing the projected cost of the proposed system; the proposed operating expenses of the proposed system; and the projected capital structure including methods of financing the construction. Rules 25-30.033(1)(j) and (m), Florida Administrative Code, apply to certification and require the applicant to provide evidence of ownership or continued use of the land upon which the facilities are or will be located and to submit a detailed system map showing the location of the proposed lines, treatment facilities, and territory proposed to be served.

Rules 25-30.033(2), (3), and (4), Florida Administrative Code, require the utility to implement the base facility and usage rate structure, to establish a return on common equity using the Commission's approved leverage formula, and authorizes the accrued allowance for funds used during construction. Rule 25-30.433(10), Florida Administrative Code, also requires the utility to provide proof that it owns the land upon which the facilities are or will be located.

### Statutory Requirements

On August 14, 1998, notice of the petition and the amended petition to temporarily waive or vary the above-mentioned rules was published in the Florida Administrative Weekly pursuant to Section 120.542(6), Florida Statutes. No written comments were received, and the time for filing such has expired. Pursuant to Section 120.542(8), Florida Statutes, the Commission is required to grant or deny the petition for variance or waiver within 90 days after receipt of the completed petition. The Commission must rule on OSUI's petition by October 28, 1998.

Section 120.542(1), Florida Statutes, states that agencies are authorized to grant variances and waivers of their rules. Section 120.542(2), Florida Statutes, requires the entity requesting a rule waiver or variance to demonstrate that the "purpose of the underlying statute will be or has been achieved by other means" and that the "application of the rule would create a substantial hardship or would violate the principles of fairness." Section 120.542(2), Florida Statutes, defines "substantial hardship" as demonstrated economic, technical, legal, or other type of hardship.

### The Underlying Statutes

The underlying statutes pertaining to the rules in this instance are Sections 367.031 and 367.045, Florida Statutes. Section 367.031, Florida Statutes, requires a utility to obtain from the Commission a certificate of authorization to provide water and wastewater service. Moreover, Section 367.045(5)(a), Florida Statutes, states that the Commission may grant a certificate of authorization in the public interest. The purpose of Sections 367.031 and 367.045, Florida 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.

Although OSUI has requested a temporary waiver of the rule requiring a utility to submit its financial statements, OSUI provided an agreement made with its parent company, Avatar, in which Avatar promises to finance the initial operation of the proposed facility and included the consolidated financial statements of Avatar, Avatar Holdings, and Avatar's subsidiaries which show OSUI has the financial backing to operate a water and wastewater system. To demonstrate its technical ability, OSUI points to the fact that Avatar is a utility holding company which has provided water and wastewater service through its subsidiaries since 1956.

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The future Ocala Springs community will need water and wastewater service. OSUI states that Ocala Springs is not within the service area of the City of Ocala nor the Marion County Water and Wastewater Utility Planning and Service areas. No protests to the application have been received, and the time for filing such has expired. Also, OSUI included in its application an agreement made with Avatar whereby Avatar promises to convey title to the land upon which the facilities will be located.

#### Substantial Hardship

OSUI contends that the development plans are "predicated on the assurances and economic feasibility of water and wastewater service which can only be achieved through the creation of a utility entity and the construction of the required water and wastewater infrastructure to serve the development." Thus, OSUI faces the technical hardship of needing the water and wastewater certificates in order to proceed with the development plans for Ocala Springs, and initial rates and charges for the utility cannot be established until its development plans are complete.

In the past, the Commission has bifurcated the application process, allowing utilities to defer the establishment of initial rates and charges. See In re: Application of Malabar Woods Utilities, Inc. for water and sewer certificates in Brevard County, Florida, Docket No. 890694-WS, Order No. 21641, July 31, 1989; see also In re: Application of Island Landing Utilities Company for original water and sewer certificates in St. Johns County, Docket No. 871108-WS, Order No. 18729, January 25, 1988; see also In re: Application by Clyatt R. Powell, et. al. d/b/a Ravenswood Forest Utilities, for original water and sewer certificates in St. Johns County, Docket No. 871170-WS, Order No. 19436, June 6, 1988. In most cases, the utility requested certification without establishing initial rates and charges because the certificate was needed to obtain permits from the Department of Environmental Protection.

OSUI is not seeking a permanent waiver of or variance from the foregoing rule requirements. The utility asks that the submittal of detailed system maps and the evidence of the ownership of the plant sites be deferred until OSUI submits its application for a consumptive use permit with the water management district (for water) and until OSUI submits its application for construction permits to the Florida Department of Environmental Protection (for wastewater) which will be by July 1, 1999, according to OSUI's revised application. OSUI states that construction will commence by January 1, 2000. OSUI requests that the submittal of a separate

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application for initial rates and charges be deferred until 24 months following the issuance of any Commission order granting the utility's original certificates.

OSUI has demonstrated that it has achieved the underlying purpose of Sections 367.031 and 367.045, Florida Statutes, pertaining to the certification of utilities. Furthermore, OSUI has shown that it will face a substantial hardship if all the provisions of Rule 25-30.033, Florida Administrative Code, are strictly applied. Therefore, based on Section 120.542, Florida Statutes, staff recommends that the Commission grant OSUI's amended petition for temporary variance from or temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open pending Commission action on OSUI's application for original water and wastewater certificates. (MCRAE, CROSBY)

**STAFF ANALYSIS:** As previously stated, OSUI has applied for an original certificate to operate a water and wastewater utility in Marion County. Therefore, this docket should remain open pending Commission action on OSUI's application for original water and wastewater certificates.