



Public Service Commission

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RECORDS AND REPORTING

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DATE: MARCH 4, 1999

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

FROM: DIVISION OF LEGAL SERVICES (FERGUSON) *JE YAT*
DIVISION OF WATER AND WASTEWATER (CLAPP) *CLAPP*

RE: DOCKET NO. 981913-WS - PETITION OF CHC VII, LTD. FOR WAIVER OF RULE 25-30.110(3), F.A.C.

AGENDA: 03/16/99 - REGULAR AGENDA - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: MARCH 21, 1999 - 90 DAY STATUTORY TIME LIMIT

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981913.RCM

CASE BACKGROUND

On December 21, 1998, CHC VII, Ltd. (CHC VII or utility) filed a Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code. CHC VII also filed a Request for Representation by a Qualified Representative. Order No. PSC-99-0063-PCO-WS, issued on January 7, 1999, in Docket No. 981913-WS, authorized Mr. Norman F. Mears to appear as Qualified Representative in this Docket on behalf of CHC.

CHC is a Class C utility which has been in existence since 1986, providing service to 870 customers in Swiss Golf & Tennis Club Mobile Home Park and Hidden Golf Club Mobile Home Park. The utility has been under Commission jurisdiction since May 14, 1996, when Pasco County transferred jurisdiction to the PSC. At the meeting with various utilities in Polk County on August 20-22, 1996, staff informed the utilities that they were under the Commission's jurisdiction, and outlined the various certification requirements that the utilities would have to comply with. On October 14, 1998, CHC applied for grandfather certificates to

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

DATE: MARCH 4, 1999

operate a water and wastewater utility in Polk County. That application is being handled in Docket No. 981341-WS. The utility has also requested that the Commission start the period for collection of regulatory assessment fees to begin with the first billing cycle after the effective date of the pass-through rate adjustment. That request is also being handled in Docket No. 981341-WS.

By letter dated October 21, 1998, Commission staff requested that CHC VII, Ltd., to file annual reports for 1996 and 1997 within sixty days. On December 21, 1998, the utility filed a Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code, requiring the utility to file its 1996 and 1997 annual reports. This recommendation addresses the Petition.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant CHC VII's Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code?

RECOMMENDATION: No. The Commission should deny CHC VII's petition for rule waiver of Rule 25-30.110(3), Florida Administrative Code, because the Petition does not meet the requirements of Section 120.542, Florida Statutes. Therefore the utility should be required to file annual reports for 1996 and 1997 within 30 days from the effective date of the order. (FERGUSON, CLAPP)

STAFF ANALYSIS: Rule 25-30.110(3), Florida Administrative Code, states that "each utility shall file with the Commission annual reports on forms prescribed by the Commission. The obligation to file an annual report for any year shall apply to any utility which is subject to this Commission's jurisdiction as of December 31 of that year, whether or not the utility has actually applied for or been issued a certificate."

As stated in the case background, by letter dated October 21, 1998, Commission staff requested that CHC VII file annual reports for 1996 and 1997 within sixty days. CHC VII filed a Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code, on December 21, 1998 "for the years 1996 and 1997 on the basis of substantial hardship and violation of principles of fairness."

As support for its Petition, CHC VII states that on September 12, 1996, it submitted an Application for Declaratory Statement Relating to Exemption from Regulation or Nonjurisdictional Finding on behalf of CHC VII, Ltd., hereinafter referred to as "Declaratory Statement", to Commission staff. Commission staff responded to CHC VII's request by letter dated August 10, 1998, stating that the utility would have to file an application for grandfather certificates by October 16, 1998. Commission staff's letter indicated that the initial request was misplaced and thus was the reason for the late response. CHC VII filed an application for grandfather certificates on October 14, 1998. CHC VII states that it would be a substantial hardship for the management group to acquire the staff to prepare the annual reports. The utility admits that its books are not in accordance with the Uniform System of Accounts owing to being previously regulated by Polk County.

The utility also states that it would be unfair to require it to file the annual reports "due to the circumstances under which regulation of CHC VII as a regulated utility was delayed." CHC VII further states that it would be unfair to require the utility to "retroactively prepare annual reports for two years, when its recognition as a regulated utility was delayed two years at no fault of its own."

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 notes that as soon as Polk County gave jurisdiction to the Commission, CHC VII became a Commission-regulated utility and had an obligation to comply with Commission Statutes and rules. Thus requiring the filing of annual reports would not be based on retroactive regulation. 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). As stated in the case background, at the meeting with various utilities in Polk County on August 20-22, 1996, Commission staff informed the utilities that they were under Commission jurisdiction and outlined the various certification requirements the utilities would have to comply with.

UNDERLYING STATUTE

The applicable underlying statute pertaining to the rule in this instance is Section 367.121(1)(c), 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.

The utility cites Order No. PSC-98-0877-FOF-SU, issued July 2, 1998, in Docket No. 971635-SU, In re: Notice of Abandonment of Wastewater System in Citrus County by RHV Utility, Inc., for support that the underlying purpose of the above-referenced statute has been achieved. The utility quotes the order: "[t]he purpose of requiring annual reports is to enable us to calculate regulatory assessment fees, as well as to determine if the utility is in an overearnings position." Staff notes that in that Docket, the utility filed its delinquent annual reports and was seeking relief from the penalty as proscribed in Rule 25-30.110(7), Florida Administrative Code. Staff also notes that pursuant to Rule 25-30.110(5)(a)-(d), Florida Administrative Code, each utility must certify in its annual report:

- (a) whether the utility is in substantial compliance with the Uniform System of Accounts;
- (b) whether the utility is in substantial compliance with all applicable rules and orders of the Commission;
- (c) whether there have been any written communications from regulatory agencies concerning noncompliance with, or deficiencies in, financial reporting practices that could have a material effect on the financial statements;
- (d) whether the financial statements and related schedules fairly present the financial condition and results of operations for the period presented and whether other information and statements presented as to the business affairs of the other information and statements presented as to the business affairs of the respondent are true, correct, and complete for the time period they represent.

Staff notes that notwithstanding CHC VII's attempt to file a Declaratory Statement seeking clarification on its regulatory statute, the utility is in the precise situation that requiring the

DATE: MARCH 4, 1999

filing of annual reports is designed to protect against. That is, in the utility's Petition, it has admitted that its books and records are in violation of the very rule it wants waived. Therefore, staff recommends that CHC VII's Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code, should be denied because the underlying purpose of the statute has not been achieved.

SUBSTANTIAL HARDSHIP OR VIOLATION OF PRINCIPLES OF FAIRNESS

Regarding hardship and fairness, the utility states that it would be unfair to require the utility to "retroactively prepare annual reports for two years, when its recognition as a regulated utility was delayed two years at no fault of its own." Further the utility asserts that it would be a substantial hardship for the management group to acquire the staff to prepare the annual reports.

Rule 25-30.110(3), Florida Administrative Code, puts the burden on utilities subject to the Commission's jurisdiction, to furnish an annual report on or before March 31 for the preceding year ending December 31. CHC VII was clearly subject to Commission jurisdiction, and thus, was required to file its annual reports for 1996 and 1997. CHC VII was put on notice of Commission Statutes and Rules at staff's meeting with the utilities on August 20-22, 1996. Further, the utility stated that its books and records are in violation of Commission regulation owing to being previously regulated by Polk County. Therefore, the utility will still have to find the resources to bring its books and records in compliance with Commission regulation.

The utility's argument regarding staff's delay in responding to the Declaratory Statement, is without merit. First, the document titled as Declaratory Statement was not properly filed with the Commission, but rather, submitted in letter format to the water and wastewater staff. Second, the utility did not follow up regarding the status of the so-called Declaratory Statement. In any case, it should have been clear to the utility that it did not qualify for any exemptions pursuant to Section 367.022, Florida Statutes. Therefore, staff recommends that CHC VII' Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code, should be denied because the utility has not demonstrated a substantial hardship or a violation of the principles of fairness.

CONCLUSION

Pursuant to Section 120.542(6), Florida Statutes, on January 28, 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 CHC VII's Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code, should be denied because the utility has not demonstrated that the underlying purpose of Section 367.121 Florida Statutes has been achieved, and that the application of the rule would not create a substantial hardship for the utility. Therefore, the utility should be required to file its 1996 and 1997 annual reports within 30 days from the effective date of the order.

DOCKET NO. 981913-WS
DATE: MARCH 4, 1999

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)

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.