

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide
wastewater service in Charlotte County, by
Environmental Utilities, LLC.

DOCKET NO. 20200226-SU
ORDER NO. PSC-2021-0066-PAA-SU
ISSUED: February 2, 2021

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman
ART GRAHAM
JULIE I. BROWN
ANDREW GILES FAY
MIKE LA ROSA

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING PETITION FOR TEMPORARY WAIVER OF
RULE 25-30.033(1)(p) and (q), F.A.C., BY ENVIRONMENTAL UTILITIES, LLC.

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

Background

On October 13, 2020, Environmental Utilities, LLC. (EU or Utility) filed its application for an original wastewater certificate in Charlotte County. The area is in the Southwest Florida Water Management District (SWFWMD). There are 1,164 existing equivalent residential connections (ERCs) and 1,683 potential ERCs in the proposed service area. Virtually all are single family residences. These properties are all currently being served by septic tanks. The proposed wastewater service will be provided by the Utility pursuant to a Bulk Sewer Treatment Agreement entered into on July 14, 2020 with Charlotte County. The Utility intends to begin serving customers by December 2022.

On October 14, 2020, the Utility filed a petition for temporary waiver of portions of Rule 25-30.033, Florida Administrative Code (F.A.C.), so that the Utility's initial rates and charges might be set at a date subsequent to the granting of the certificate of authorization. We had 90 days, until January 12, 2021, to grant or deny the waiver pursuant to Section 120.542(8), Florida Statutes (F.S.).

This order addresses EU's request for a temporary rule waiver of Rule 25-30.033(1)(p) and (q), F.A.C. We have jurisdiction pursuant to Sections 367.031, 367.045, and 120.542, F.S.

Discussion

Rule 25-30.033(1)(p) and (q), F.A.C.

Rule 25-30.033(1)(p) and (q), F.A.C., directs the applicant for an original certificate to file information necessary for setting initial rates and charges, including: the filing of the existing and projected cost of the system and associated depreciation by year, the existing and projected annual contributions-in-aid-of-construction and associated amortization by year, the projected capital structure, current and projected annual operating expenses, a schedule showing how the proposed rates were developed, a schedule showing how the proposed service availability policy and charges were developed, a schedule showing how the customer deposits and miscellaneous service charges were developed, and a draft of the proposed tariff for the Utility.

EU has asked for a temporary waiver of these portions of the rule so that it may receive its certificates from us, and then proceed with other permitting. Section 367.031, F.S., requires each utility seeking to provide water and wastewater service to obtain a certificate of authorization from us prior to obtaining permits from the Department of Environmental Protection (DEP) and the state's water management districts. If this rule waiver is approved, when EU has received its permits, it would then provide accurate cost estimates, schedules, and cost studies to support initial rates and charges.

Legal Standard for Rule Waivers

Section 120.542(1), F.S., states that the purpose of a rule variance¹ or waiver is to provide relief to persons subject to regulation in cases where strict application of rule requirements can lead to unreasonable, unfair, and unintended results in particular circumstances. Section 120.542(2), F.S., sets forth a two-prong test for granting waivers to rules. If the petitioner satisfies both prongs of the test, the agency must grant the waiver.

First, the petitioner must show that "application of [the] rule would create a substantial hardship or would violate principles of fairness." A "substantial hardship" is a "demonstrated economic, technological, legal, or other type of hardship." Principles of fairness are violated when "the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule."

Second, the petitioner must demonstrate that it will achieve the purpose of the underlying statutes by other means. Section 367.031, F.S., requires each utility seeking to provide water and wastewater service to obtain a certificate of authorization from the Commission prior to obtaining permits from the Department of Environmental Protection (DEP) and the state's water management districts. Further, Section 367.045(5)(a), F.S., states that the Commission may grant

¹ A waiver is a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Section 120.52(22), F.S.

a certificate of authorization if it is in the public interest. The purpose of Sections 367.031 and 367.045, F.S., is to ensure that a utility has the financial and technical ability to provide service, that there is a need for service in the proposed service area, and to determine the existence or nonexistence of service from other sources within geographical proximity to the proposed service area.

Each petitioner for rule waiver has the burden of proving its entitlement to a waiver under its particular circumstances. Thus, our determination as to whether a petitioner should be granted a waiver is based on whether the legal test has been met under the specific circumstances of each petitioner.

Petition and Comments

EU has requested this waiver until it receives its other permits and is closer to commencing operations. In its petition, EU states that although it does not expect to provide service until 2022, Section 367.031, F.S., requires the Utility obtain certificates from us prior to DEP issuing construction permits.² Until such permits are issued, the Utility states that it will not have the financial information required for the Commission to set initial rates. According to the Utility, trying to accurately establish initial rates in the absence of such necessary information presents an undue hardship to EU, should the provisions of Rule 25-30.033, F.A.C., be strictly applied.

EU states that it will file its proposed tariffs and other required financial schedules to set initial rates sufficiently in advance of beginning operations so that we would have sufficient time to review and to establish initial rates and charges. EU expects to file the information required to set initial rates and charges in the first quarter of 2022, which would be at least nine months prior to the December 2022 date EU plans to commence service to customers.

Rule 28-104.005(1), F.A.C., provides that interested persons may submit written comments on the petition for a waiver within 14 days after publication of the notice in the FAR. Multiple potential customers filed comments opposing EU's waiver request. Even though these comments were filed after this 14-day period, there was sufficient time for the comments to be reviewed and addressed. In addition, potential customers participated at the Agenda Conference. The comments opposed to granting the waiver were generally based on a lack of receiving rate information until 2022, a perceived lack of financial strength and management experience of EU, and that EU had not demonstrated a substantial hardship.

Conclusion

EU has the burden of demonstrating that application of Rule 25-30.033(1)(p) and (q), F.A.C., would create a substantial hardship or violate principles of fairness, and that it will achieve the purpose of the underlying statutes by other means. The burden of a substantial hardship and meeting the underlying purpose of the statute has to be rigorously followed. Based

² Motion to Bifurcate and for Temporary Rule Wavier, filed 10/14/2020, Document No. 11172-2020.

on the facts before us, we find that EU's has not demonstrated that establishing initial rates and charges in its application for an original certificate demonstrates a substantial hardship. Thus, we find that EU has not met its burden for a waiver of Rule 25-30.033(1)(p) and (q), F.A.C. For the reasons stated above, we hereby deny Environmental Utility LLC.'s petition for waiver of Rule 25-30.033(1)(p) and (q), F.A.C.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Environmental Utility LLC.'s petition for waiver of Rule Rule 25-30.033(1)(p) and (q), F.A.C., is denied for the reasons set forth in the body of this Order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that this docket shall remain open pending our decision on the application for an original wastewater certificate.

By ORDER of the Florida Public Service Commission this 2nd day of February, 2021.


ADAM J. TEITZMAN
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

DISSENTS

Commissioner Art Graham dissents from the Commission's decision.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 23, 2021.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.