

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** February 23, 2023

**TO:** Office of Commission Clerk (Teitzman)

**FROM:** Division of Economics (Bruce, Bethea, Hudson) *JGH*  
Division of Accounting and Finance (Sewards) *ALM*  
Office of the General Counsel (Crawford, Sandy, Thompson) *JSC*

**RE:** Docket No. 20220201-WS – Request by Florida Community Water Systems, Inc. for a revenue-neutral rate restructuring in Brevard, Lake, and Sumter Counties.

**AGENDA:** 03/07/23 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** La Rosa

**CRITICAL DATES:** 03/07/23 (90-day statutory deadline waived until 03/07/23)

**SPECIAL INSTRUCTIONS:** None

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## Case Background

On November 14, 2022, Florida Community Water Systems, Inc. (FCWS) filed an application for a revenue-neutral rate restructuring limited proceeding for the fourteen water and wastewater systems it owns in Brevard, Lake, and Sumter counties. FCWS is seeking a rule waiver to use the limited proceeding rule, Rule 25-30.445, Florida Administrative Code (F.A.C.), to consolidate these systems for ratemaking purposes.

The ten water systems at issue here are Black Bear Waterworks, Inc. (Black Bear); Brendenwood Waterworks, Inc.; Brevard Waterworks, Inc.; Harbor Waterworks, Inc. (Harbor); Jumper Creek Utility Company (Jumper Creek); Lake Idlewild Utility Company; Lakeside Waterworks, Inc. (Lakeside); Pine Harbour Waterworks, Inc.; Raintree Waterworks, Inc.; and The Woods Utility

Company. Four of these systems also have wastewater systems: Harbor, Jumper Creek, Lakeside, and The Woods Utility Company. By Order No. PSC-2022-0095-FOF-WS, the Commission acknowledged the corporate reorganization and name change of these systems to FCWS.<sup>1</sup> The corporate reorganization resulted in no change in the ownership or control of the utilities, and each FCWS system continues to charge its own respective Commission-approved rates and charges.

In its November 14, 2022, petition for limited proceeding, FCWS seeks uniform rates for these systems. FCWS states that the various rates charged by each system are widely disparate. Uniform rates, if granted, would result in a reduction in typical residential bills, except for Lakeside wastewater customers and all Harbor customers, and would provide significant relief to the customers in the financially distressed systems.

The Commission has broad authority to conduct limited proceedings under Section 367.0822(1), Florida Statutes (F.S.). Rule 25-30.445, F.A.C., which the Commission adopted to implement Section 367.0822, F.S., restricts the ability of water and wastewater systems to use the limited proceeding process. Rule 25-30.445(6), F.A.C., provides that a limited proceeding will not be allowed if:

- (a) The utility's filing includes more than six separate projects for which recovery is sought. Corresponding adjustments for a given project are not subject to the above limitation;
- (b) The requested rate increase exceeds 30 percent;
- (c) The utility has not had a rate case within seven years of the date the petition for limited proceeding is filed with the Commission; or
- (d) The limited proceeding is filed as the result of the complete elimination of either the water or wastewater treatment process.

FCWS argues that Rule 25-30.445, F.A.C., seems to contemplate a petition for limited proceeding is predicated upon a rate increase. However, FCWS is requesting a revenue-neutral rate restructuring based upon existing historical revenues, not a revenue increase. Further, FCWS recognizes that not all of its systems meet the seven-year rate case requirement of Rule 25-30.445(6)(c), F.A.C. Consequently, on December 5, 2022, FCWS filed a request for a partial variance from, or waiver of, the requirements of the rule governing limited proceedings.

Florida law allows agencies to waive or provide other relief (variances) to persons subject to regulation where the strict application of uniformly applicable rule requirements leads to "unreasonable, unfair, and unintended results in particular instances." Section 120.542(1), F.S.

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<sup>1</sup> Issued February 21, 2022, in Docket No. 20210192-WS, *In re: Joint application for acknowledgment of corporate reorganization and approval of name changes on Certificate No. 654-W in Lake County from Black Bear Waterworks, Inc., Certificate No. 339-W in Lake County from Brendenwood Waterworks, Inc., Certificate No. 002-W in Brevard County from Brevard Waterworks, Inc., Certificate Nos. 522-W and 565-S in Lake County from Harbor Waterworks, Inc., Certificate Nos. 667-W and 507-S in Sumter County from Jumper Creek Utility Company, Certificate No. 531-W in Lake County from Lake Idlewild Utility Company, Certificate Nos. 567-W and 494-S in Lake County from Lakeside Waterworks, Inc., Certificate No. 450-W in Lake County from Pine Harbour Waterworks, Inc., Certificate No. 539-W in Lake County from Raintree Waterworks, Inc., Certificate Nos. 507-W and 441-S in Sumter County from The Woods Utility Company to Florida Community Water Systems, Inc.*

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Variations 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 when application of a rule would create a substantial hardship or would violate principles of fairness. Section 120.542(2), F.S.

On December 8, 2022, the Commission filed a Florida Administrative Register notice acknowledging receipt of FCWS's rule waiver petition. The time for filing comments, provided by Rule 28-104.003, F.A.C., expired on December 23, 2022; no comments as to FCWS's rule waiver petition were received. On January 5, 2023, FCWS waived the 90-day deadline for the Commission to grant or deny its petition, pursuant to Section 120.542(8), F.S., through the March 7, 2023, Commission Agenda Conference. Thereafter, on January 6, 2023, FCWS filed a supplement to its application and petition for waiver.

This recommendation addresses FCWS's petition for rule waiver only. If the Commission approves FCWS's request for rule waiver, a subsequent recommendation addressing the merits of FCWS's application for a rate restructuring will be presented at a subsequent Agenda Conference. The Commission has jurisdiction under Sections 120.542, 367.0822, and 367.121, F.S.

## Discussion of Issues

**Issue 1:** Should the Commission grant FCWS's petition for a waiver of Rule 25-30.445(6), F.A.C.?

**Recommendation:** Yes. FCWS has demonstrated that the purpose of the underlying statute is being achieved and that strict application of the rule violates principles of fairness to its customers. (Thompson, Sandy, Crawford)

### Staff Analysis:

#### FCWS's Petition

In its November 14, 2022, petition for limited proceeding, FCWS states that the various rates reflect a wide disparity among its systems. Several systems have had multiple rate cases before the Commission due to increased capital requirements, increased operating expenses, and declining consumption. Others – Harbor and Black Bear – have never had a rate case before the Commission. FCWS contends that the implementation of uniform rates would be more efficient and result in a more equitable disbursement of operating costs among the customers of the FCWS systems. FCWS contends that the uniform rates, if granted, would result in a reduction in typical residential water bills, with the exception of Harbor, and would provide significant relief to the customers in the financially distressed systems.

FCWS's application seeks to achieve a revenue-neutral rate restructuring through a limited proceeding instead of through a full rate case, which, because of rate case expense, it contends would negate the savings to customers and may counterproductively result in a rate decrease for Harbor. FCWS acknowledges that neither Harbor nor Black Bear have had a full rate case, and it has been 8 years since the Commission set rates for Brevard Waterworks, Inc. and Jumper Creek.<sup>2</sup>

One system in particular, Harbor, would benefit from conservation rates. Harbor has relatively low rates and has consumed water beyond the limit of the utility's consumptive use permit. The utility has begun working with the local water management district and has retained a conservation expert for irrigation audits. Despite these efforts, the customers of the utility continue to use excessive amounts of water. According to FCWS, numerous customers in Harbor are regularly using over 100,000 and 200,000 gallons of water per month.

Another system, Black Bear, would likewise benefit from conservation rates. For Black Bear, the base facility charge includes the first 5,000 gallons of water usage. FCWS asserts that including

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<sup>2</sup> See Order No. PSC-11-0478-PAA-WU, issued October 24, 2011, in Docket No. 100085-WU, *In re: Application for certificate to operate water utility in Lake County by Black Bear Reserve Water Corporation*; Order No. PSC-12-0580-PAA-SU, issued October 26, 2012, in Docket No. 120158-SU, *In re: Application for original certificate for an existing wastewater system, requesting initial rates and charges in Lake County by Harbor Waterworks, Inc.*; PSC-15-0335-PAA-WS, issued August 20, 2015, in Docket No. 20140147-WS, *In re: Application for staff-assisted rate case in Sumter County by Jumper Creek Utility Company*; and Order No. PSC-16-0421-PAA-WU, issued October 3, 2016, in Docket No. 20140186-WU, *In re: Application for staff-assisted rate case in Brevard County by Brevard Waterworks, Inc.*

water as part of the base facility charge is contrary to Florida’s conservation efforts. Additionally, FCWS believes it would be more efficient to have a uniform rate structure for all of its systems.

FCWS seeks an inclining block rate structure on all ten of its water systems. As a result of the requested rate restructuring, FCWS projects that residential water bills would be reduced at all levels for eight of the ten systems. The only systems that would see a rate increase are the Harbor system, where FCWS expects a repression of usage from the new conservation rates, and the Lakeside wastewater customers. Per FCWS’s projections, the customers of some systems could see their monthly water bills drop by as much as \$134.21. Harbor’s bills, however, would only increase by \$9.92 at the 10,000-gallon level for water, by \$12.43 at the 10,000-gallon level for wastewater, and by even less at lower consumption levels. Lakeside’s wastewater bill would increase by \$5.53 at the 3,000-gallon level and would actually result in \$0.83 in savings at the 10,000-gallon level. However, rate changes to certain classes and meter sizes for both of the Harbor systems and Lakeside’s wastewater system exceed the 30 percent limitation set by Rule 25-30.445(6)(b). Therefore, parts (b) and (c) would both have to be waived.

FCWS contends that the purpose of the statute is to afford the Commission broad discretion as to matters that are appropriate for a limited proceeding in order to alleviate the time and expense of full rate proceedings. As to the requirement that a utility can avail itself to a limited proceeding only if it has had a rate case within the last seven years, FCWS states that although there is “nothing magic” about seven years, it was intended to assure that when a limited proceeding rate increase was considered, the utility’s overall financial information had been vetted in recent years by the Commission. FCWS argues that when the limited proceeding doesn’t seek a revenue increase (other than for rate case expense), that vetting is not necessary. Further, FCWS believes the underlying purpose of the statute would be achieved if a waiver or variance is granted because the Commission would retain its right to obtain information required to achieve the appropriate rate consolidation, including conducting an audit, if necessary.

### **Requirements of Section 120.542, F.S.**

Section 120.542(2), F.S., provides a two-pronged test for determining when waivers of and variances from agency rules 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 when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, “substantial hardship” means demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. For purposes of this section, “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.

### ***Purpose of the Underlying Statute***

Rule 25-30.445, F.A.C., primarily implements Section 367.0822, F.S.,<sup>3</sup> which authorizes the Commission to “conduct limited proceedings to consider, and act upon, any matter within its jurisdiction . . . .” Rule 25-30.445(6), F.A.C., serves to limit the matters that the Commission may take up via a limited proceeding. The Commission has previously opined as to the underlying purpose of Section 367.0822, F.S.:

We believe that the purpose of the Legislature in enacting Section 367.0822, Florida Statutes (1985), was to provide a narrow exception to Section 367.081, Florida Statutes (1985), which requires the Commission to consider a broad range of ratemaking components. The purpose of a limited proceeding is to permit review of generally singular topics, or a few well-defined issues, to the exclusion of all others. The limited applicability of such a proceeding mandates that the burden must rest on the utility to prove that Section 367.0822, Florida Statutes (1985) should, in fact, be utilized with regard to a specific case.<sup>4</sup>

While the Commission has approved prior rate consolidations in the context of full rate case proceedings,<sup>5</sup> there is no statutory requirement that rate consolidations must be conducted under Section 367.081, F.S., versus a Section 367.0822, F.S., proceeding. Further, the Commission has allowed revenue-neutral rate restructuring through a limited proceeding on prior occasions.<sup>6</sup>

The limitations set out under Rule 25-30.445, F.A.C., are unique to the water and wastewater industry. Section 366.076, F.S., provides for petitions for limited proceedings by electric and gas companies, and its associated Rule 25-6.0431, F.A.C., does not contain the same limiting provisions as Rule 25-30.455, F.A.C. The purpose of Section 367.0822, F.S. – to allow the Commission to review the singular issue of a revenue-neutral consolidation of the FCWS systems’ rates – is met if Rule 25-30.445(6), F.A.C., is waived. As acknowledged by FCWS, the Commission would retain its authority to solicit any information needed to process the requested rate consolidation, including conducting an audit if necessary, as well as continue regulatory oversight and earnings’ surveillance through FCWS’s annual reports. Staff therefore recommends that FCWS has demonstrated that the purpose of the underlying statute would be achieved if the requirements of Rule 25-30.445(6), F.A.C., are waived.

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<sup>3</sup> Rule 25-30.445, F.A.C., also implements Sections 367.081, 367.0812, 367.121(1)(a), and 367.145(2), F.S.

<sup>4</sup> Order No. 16670, issued October 2, 1986, in Docket No. 861056-SU, *In re: Petition of Betmar Utilities for Limited Proceeding for Adjustment in Sewer Rate Base in Pasco County* and PSC-2010-0219-PAA-WS.

<sup>5</sup> See, e.g., Order No. PSC-2017-0361-FOF-WS, issued September 25, 2017, in Docket No. 20160101-WS, *In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida*.

<sup>6</sup> Order Nos. PSC-95-0967-FOF-SU, issued August 8, 1995, in Docket No. 19941270-SU, *In re: Application for revenue neutral wastewater rate restructuring in Lee county by Forest Utilities, Inc.* and PSC-10-0219-PAA-WS, issued April 6, 2010, in Docket No. 20080295-WS, *In re: Request by Sun Communities Finance, LLC d/b/a Water Oak Utility for a revenue-neutral rate restructuring to implement conservation rates in Lake County*.

### ***Substantial Hardship or Principles of Fairness***

The second prong of the rule waiver test is met if strict application of the rule either (1) creates a substantial hardship or (2) would violate the principles of fundamental fairness. The utility may meet the second prong through either path and is not required to show both.

In its petition, FCWS argues that denying the rule waiver would result in an economic hardship as it would require FCWS to file for a full rate case in order to achieve consolidation of its systems' rates. A full rate case would involve compiling and filing ten separate sets of Minimum Filing Requirements and retaining outside legal counsel, the costs of which would reduce or obviate any customer savings as a result of the rate restructuring. While the costs of a full rate proceeding may be substantial, staff is not persuaded that such costs per se constitute an "economic hardship" to the utility sufficient to support waiver of the rule. While customers might pay substantially more for rate consolidation effected under a Section 367.081, F.S., rate proceeding, subsection 367.081(7), F.S., permits the utility to recover its reasonable rate case expense through rates paid by its customers.

However, the second prong of the rule waiver statute may also be met when application of the rule would violate principles of fairness. "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. Section 120.542(2), F.S.

In its January 6, 2023, supplemental filing, FCWS states that the Commission has a long-standing policy of encouraging the consolidation of smaller systems, and that the natural progression from the consolidation of systems is the consolidation of rates. Further, the Commission has previously noted the benefits of rate consolidation to both utilities and their customers.<sup>7</sup> Specifically, in Order No. PSC-2010-0219-PAA-WS for Betmar Utilities, the Commission stated that "a revenue neutral rate restructuring for a Class B utility is tantamount to a limited proceeding rate case with no revenue increase." In that case, the Commission considered the need for a conservation-oriented rate structure in making its decision.

FCWS is uniquely affected by the strict application of the rule. Because Black Bear and Harbor's existing rates were grandfathered in at the time they were certificated, those systems have never had a full rate case before the Commission. However, Harbor continues to consume significant amounts of water, with numerous customers consistently using up to 200,000 gallons per month. This is in conflict with Florida's water conservation efforts, and the St. Johns River Water Management District (SJRWMD) has worked with Harbor to address the exceedance of Harbor's consumptive use permit. Harbor and the SJRWMD have attended meetings of the Harbor homeowners' association, and FCWS retained a conservation expert to conduct on-site irrigation audits at the customers' residences. In spite of these efforts, the usage of customers served by

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<sup>7</sup> The Commission has found that consolidated, uniform rates provide the customers with greater control over their water bill and provides the utility with a less complicated and expensive billing procedure. See Order No. 13014, issued February 20, 1984, in Docket No. 810386-WU, *In re: Request of Sunshine Utilities, Inc. for Staff Assistance on a Rate Increase to Customers in Marion County, Florida*, at p. 3 and Order No. PSC-2017-0361-FOF-WS, issued September 25, 2017, in Docket No. 20160101-WS, *In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida*, at p. 189.

Harbor remains excessive, and the low rates do not send appropriate conservation signals to Harbor's customers. FCWS has also been unable to implement conservation rates due to Harbor's relatively low revenue requirement.

Allowing FCWS to pursue a revenue-neutral rate restructuring and consolidate its systems' rates through a limited proceeding is expected to allow the majority of FCWS's customers to benefit from lower rates, send more appropriate conservation-oriented price signals to Harbor's customers, simplify FCWS's tariffs, and create regulatory efficiencies that benefit the FCWS systems and its customers alike. Requiring FCWS to pursue these goals through a full base rate proceeding would unfairly minimize or obviate the benefits of consolidation by adding the additional time and rate case expense required to process an application pursuant to Section 367.081, F.S.

Staff recommends that a limited proceeding will allow the Commission to maintain appropriate regulatory oversight of the proposed rate consolidation, to the benefit of the utility and its customers. Under the unique circumstances of this case, the potential benefits to the utility and its customers stand to be lost if FCWS is not permitted to pursue the proposed revenue-neutral rate restructuring as a limited proceeding. Therefore, staff recommends that strict application of the rule would violate the principles of fairness.

## **Conclusion**

Section 120.542(1), F.S., acknowledges that strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Commission must waive a rule if the utility can show both that the purpose of the underlying statute is achieved by other means, and that the principles of fairness are violated if the rule is strictly applied. This case presents a unique situation wherein the strict application of the rule affects FCWS significantly differently than it would another utility, and the petition meets both prongs of the test. Therefore, staff recommends the Commission grant the petition for waiver of Rule 25-30.445(6), F.A.C.

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

**Recommendation:** If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued. If the utility's petition for a rule waiver is granted, then the docket should remain open pending the Commission's decision regarding FCWS's petition for a limited proceeding. However, if the utility's petition for a rule waiver is denied, then the docket should be closed upon the issuance of the consummating order. (Thompson, Sandy, Crawford)

**Staff Analysis:** If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued. If the utility's petition for a rule waiver is granted, then the docket should remain open pending the Commission's decision regarding FCWS's petition for a limited proceeding. However, if the utility's petition for a rule waiver is denied, then the docket should be closed upon the issuance of the consummating order.