

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for waiver of
Rule 25-30.110(3), F.A.C. by
Hidden Cove, Ltd. in Polk
County.

DOCKET NO. 981915-WS
ORDER NO. PSC-99-0641-FOF-WS
ISSUED: April 5, 1999

The following Commissioners participated in the disposition of
this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING PETITION FOR WAIVER OF RULE 25-30.110(3), F.A.C.,
AND REQUIRING THE UTILITY TO FILE AN AFFIDAVIT CERTIFYING
REVENUES TO DETERMINE REGULATORY ASSESSMENT FEES FOR
1996 AND 1997

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.

BACKGROUND

On December 21, 1998, Hidden Cove, Ltd, (Hidden Cove or
utility) filed a Petition for Waiver of Rule 25-30.110(3), Florida
Administrative Code. Hidden Cove also filed a Request for
Representation by a Qualified Representative. By Order No. PSC-99-
0065-PCO-WS, issued January 7, 1999, in Docket No. 981915-WS, we
authorized Mr. Norman F. Mears to appear as Qualified
Representative in this docket on behalf of Hidden Cove.

Hidden Cove is a Class C utility which has been in existence
since 1982, providing service to 122 customers in Hidden Cove
Mobile Home Park. The utility has been under our jurisdiction

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since May, 14, 1996, when Polk County transferred jurisdiction to the Commission. At the meeting with various utilities in Polk County on August 20-22, 1996, our staff informed the utilities that they fall under the Commission's jurisdiction, and outlined the various certification requirements. On October 14, 1998, Hidden Cove applied for grandfather certificates to operate a water and wastewater utility in Polk County. That application is being handled in Docket No. 981339-WS. Moreover, the utility has requested that we 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. 981339-WS.

By letter dated October 21, 1998, our staff requested that Hidden Cove 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.

PETITION FOR WAIVER OF
RULE 25-30.110(3), FLORIDA ADMINISTRATIVE CODE

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 background, by letter dated October 21, 1998, our staff requested that Hidden Cove file annual reports for 1996 and 1997 within sixty days. Hidden Cove 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, Hidden Cove stated that on September 12, 1996, CHC VII, Ltd., (CHC VII) submitted an Application for Declaratory Statement Relating to Exemption from Regulation or Nonjurisdictional Finding on behalf of CHC VII, Ltd., (Declaratory Statement), to our staff. Hidden Cove also stated

that the same group which manages CHC VII, manages Hidden Cove and thus, by that association, Hidden Cove was covered in the management group's 1996 request on behalf of CHC VII, Ltd. Our 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. Our staff's letter indicated that the initial request was misplaced and thus was the reason for the late response. Hidden Cove filed an application for grandfather certificates on October 14, 1998. Hidden Cove further stated that it would be a substantial hardship for the management group to acquire the staff to prepare the annual reports. The utility admitted in its petition that its books were not kept in accordance with the Uniform System of Accounts, because the utility was previously regulated by Polk County.

The utility also stated that it would be unfair to require it to file the annual reports "due to the circumstances under which regulation of Hidden Cove as a regulated utility was delayed." Although the utility maintained that since the management group filed the Declaratory Statement on behalf of CHC VII, in 1996, and that somehow Hidden Cove was included by association; in examining the Declaratory Statement, Hidden Cove is not mentioned. Hidden Cove further stated 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.

Underlying Statute and Substantial Hardship

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 cited 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. By that order, the Commission found that "[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." In that docket however, 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. We note 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 respondent are true, correct, and complete for the time period they represent.

We also note that the utility is in the precise situation that requiring the filing of annual reports is designed to protect against. That is, the utility has admitted that its books and records are in violation of the very rule it wants waived. Therefore, we find that Hidden Cove has not met its burden because the underlying purpose of the statute has not been achieved.

Regarding hardship, the utility asserted that it would be a substantial hardship for the management group to acquire the staff to prepare the annual reports. Because the utility admits that its books and records are not in compliance with Rule 25-30.110(3), Florida Administrative Code, we do not need to reach a finding on substantial hardship and will now address the alleged violation of principle of fairness.

Violation of Principles of Fairness

Regarding fairness, the utility stated that it would be unfair to require it 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." The utility's argument regarding our staff's delay in responding to the Declaratory Statement has some merit. First, although 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, our staff did not respond to the request in a timely fashion.

Because we believe it is a violation of the principles of fairness to require the annual reports be filed for 1996 and 1997, we find it appropriate to grant the utility's Petition. However, we do not intend for this decision to mean that the utility does not need to remit regulatory assessment fees for those years. Therefore, we order the utility to timely certify its revenues via affidavit for 1996 and 1997 so that we may properly calculate the regulatory assessment fees for those years. Further, we hereby order that the utility shall either timely file its annual report for 1998 or timely request an extension through the appropriate means. The annual report for 1998 shall be in compliance with Rule 25-30.110(3), Florida Administrative Code.

CONCLUSION

Pursuant to Section 120.542(6), Florida Statutes, on January 28, 1998, we provided notice to the Department of State, which published notice of the waiver request in the Florida Administrative Weekly. After reviewing the petition, we found no deficiencies. The Commission did not receive any comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, we are required to issue an order in writing granting or denying the petition for waiver or variance stating the relevant facts and reasons supporting our decision within ninety days after receipt of the original petition.

Based on the foregoing, Hidden Cove's Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code, is granted based upon a finding of violation of principles of fairness pursuant to Section 120.542, Florida Statutes.

This docket shall be closed if no person whose interests are substantially affected by the proposed action files a protest within the twenty-one day protest period.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Hidden Cove Ltd.'s Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code, is hereby granted. It is further

ORDERED that Hidden Cove Ltd., shall timely certify its revenues via affidavit for 1996 and 1997. It is further

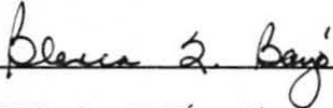
ORDERED that Hidden Cove Ltd., shall file its annual report for 1998 in compliance with Rule 25-30.110(3), Florida Administrative Code, or timely request an extension. It is further

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

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ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 5th day of April, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review 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 Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on April 26, 1999.

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In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

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

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.