

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

December 5, 1996

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

FROM: DIVISION OF APPEALS (CALDWELL) *ouc DS*
DIVISION OF WATER & WASTEWATER (WILLIAMS, MESSER) *W. MESSER*
DIVISION OF RESEARCH & REGULATORY REVIEW (HEWITT) *HEWITT*

RE: DOCKET NO. 960933-WS - PROPOSED REPEAL OF RULE 25-30.060, F.A.C., APPLICATION FOR EXEMPTION FROM REGULATION OF NONJURISDICTIONAL FINDING

AGENDA: DECEMBER 17, 1996 - REGULAR AGENDA - RULE ADOPTION - INTERESTED PERSONS MAY NOT PARTICIPATE

RULE STATUS: ADOPTION MAY BE DEFERRED

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\960933#2.RCM

CASE BACKGROUND

In its 1996 Session, the Legislature amended Section 367.031, Florida Statutes, to eliminate the requirement that an order recognizing a system is exempt from regulation as provided by Section 367.022, Florida Statutes, be issued by the Commission. This amendment has the effect of eliminating the need for applications and subsequent orders for exemptions such as: bottled water, governmental entities, public lodging and landlords providing service to guests and tenants, small systems, and non-profit corporations, to name a few.

This legislative action was accompanied by a budget cut to the agency which eliminated positions. The Division of Water and Wastewater and the Division of Legal Services are discontinuing the "exception" program, and are, therefore, proposing to repeal the existing rules that apply to the program.

On September 3, 1996, the Commission voted to repeal the exemption rule. On October 15, 1996, the Federation of Mobile Home Owners of Florida Inc., (FMHOF) filed comments.

DOCUMENT NUMBER-DATE

12949 DEC-58

FPSC-RECORDS/REPORTING

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission adopt the repeal of Rule 25-30.060, Florida Administrative Code, Application for Exemption from Regulation or Non-Jurisdictional Finding?

RECOMMENDATION: Yes.

STAFF ANALYSIS: In its comments, the FMHOF urges a delay in the repeal of this rule and suggested that the Commission adopt a rule requiring water and wastewater service providers who claim to be exempt under Section 367.022, Florida Statutes, to file a statement or report with the Commission on an annual basis so that the Commission is aware of who is providing water and wastewater service to consumers. FMHOF is concerned that mobile home park owners and the other entities who claim to be exempt under Section 367.022, Florida Statutes, will make a unilateral determination that they are exempt. FMHOF states that the effect of the repeal will place the burden on the consumer to file a court proceeding to determine whether the provider is in fact entitled to the exemption and, in the alternative, will require consumers to file complaints with the PSC for a determination by the Commission as to whether the utility is exempt.

During the 1996 Legislative session, Chapter 120, Florida Statutes, was changed significantly. With respect to rulemaking, agencies must follow stricter guidelines when promulgating rules. Under the definition of "invalid exercise of delegated legislative authority" some guidance to agencies is provided by the Legislature and is stated as follows:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally

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describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute. Section 120.52(8), Florida Statutes.

Chapter 367, Florida Statutes, does not give the Commission specific authority to require registration of or any other filing by those companies who are exempt from regulation by the Commission. The Commission only has jurisdiction of those water and wastewater companies who are not exempt. The proposed repeal of Rule 25-30.060, F.A.C., is based upon the elimination of the Commission's authority to issue orders recognizing a company's exemption. The rule established the criteria upon which the orders were based. The Commission cannot maintain this criteria nor its procedure of exempting companies without the Legislative authority, and therefore, it is appropriate to repeal this rule.

Staff has the same concerns as FMHOF. In addition, Section 367.002(8), Florida Statutes, requires resellers of water and wastewater to file annual reports with the Commission and to submit to meter testing under Section 367.122, Florida Statutes. Without the ability to find out what companies are exempt or not, Staff has no idea whether all resellers are reporting. The Commission is considering proposing legislation to eliminate these requirements, which the Commission has no authority to enforce under the existing statute. Meanwhile, the Commission does not have the authority to keep Rule 25-30.060, F.A.C.

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ISSUE 2: Should the rule amendments as proposed be filed for adoption with the Secretary of State and the docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: If the Commission approves the proposed repeal, the rules as proposed may be filed with the Secretary of State without further Commission action. The docket may then be closed.

Attachment:

Proposed Rule Repeal
Comments Submitted by FMHOF

1
2 25-30.060 Application for Exemption from Regulation or
3 Nonjurisdictional Finding.

4 ~~(1) Each application for an exemption shall be filed in~~
5 ~~original and four copies, with the Director, Division of Records~~
6 ~~and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida~~
7 ~~32399-0870. Sample application forms may be obtained from the~~
8 ~~Division of Water and Wastewater, 2540 Shumard Oak Boulevard,~~
9 ~~Tallahassee, Florida 32399-0850.~~

10 ~~— (2) Each application for an exemption from regulation shall~~
11 ~~contain the following information:~~

12 ~~— (a) The name of the system owner;~~

13 ~~— (b) The physical address of the system;~~

14 ~~— (c) The mailing address of the applicant, if different from~~
15 ~~the system address;~~

16 ~~— (d) The name, address, and phone number of the primary contact~~
17 ~~person for the exemption request;~~

18 ~~— (e) The nature of the applicant's business organization, e.g.,~~
19 ~~corporation, partnership, limited partnership, sole proprietorship,~~
20 ~~association; and~~

21 ~~— (f) A statement that the applicant is aware that pursuant to~~
22 ~~Section 837.06, Florida Statutes, whoever knowingly makes a false~~
23 ~~statement in writing with the intent to mislead a public servant in~~
24 ~~the performance of his official duty shall be guilty of a~~

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~~struck-through~~ type are deletions from existing law.

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2 ~~misdemeanor of the second degree, punishable as provided in s.~~
3 ~~775.082 or s. 775.083.~~

4 ~~— (3) Each application must specifically state which type of~~
5 ~~exemption is being applied for and contain one of the following:~~

6 ~~— (a) For an exemption pursuant to Section 367.022(1), Florida~~
7 ~~Statutes, a statement from the owner of the system that the system~~
8 ~~is used solely to provide bottled water and that water is not~~
9 ~~provided to customers through a water main or service pipe;~~

10 ~~— (b) For an exemption pursuant to Section 367.022(2), Florida~~
11 ~~Statutes, a statement from the governmental authority specifying~~
12 ~~the statutory authority for the governmental authority; that the~~
13 ~~system is owned, operated, managed, or controlled by the~~
14 ~~governmental authority; and stating whether it provides water~~
15 ~~service, wastewater service or both. The applicant shall describe~~
16 ~~with particularity the nature of the ownership, operation,~~
17 ~~management, and control of the system;~~

18 ~~— (c) For an exemption pursuant to Section 367.022(3), Florida~~
19 ~~Statutes, a statement from the manufacturer that service is~~
20 ~~provided solely in connection with its operations; and stating~~
21 ~~whether it provides water service, wastewater service or both;~~

22 ~~— (d) For an exemption pursuant to Section 367.022(4), Florida~~
23 ~~Statutes, a statement from the public lodging establishment that~~
24 ~~service is provided solely in connection with service to its~~

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2 ~~guests, and stating whether it provides water service, wastewater~~
3 ~~service or both;~~

4 ~~—— (e) For an exemption pursuant to Section 367.022(5), Florida~~
5 ~~Statutes, a statement from the landlord that it provides service~~
6 ~~solely to tenants; that charges for service are non specifically~~
7 ~~contained in rental charges; and stating whether it provides water~~
8 ~~service, wastewater service or both. A copy of the landlord's most~~
9 ~~recent version of a standard lease or rental agreement shall be~~
10 ~~submitted with the application;~~

11 ~~—— (f) For an exemption pursuant to Section 367.022(6), Florida~~
12 ~~Statutes, a statement from the owner of the system that the system~~
13 ~~has or will have the capacity to serve 100 or fewer persons; and~~
14 ~~stating whether it provides water service, wastewater service or~~
15 ~~both. The applicant shall submit documentation verifying the~~
16 ~~capacity of the system(s). For a wastewater system, the capacity of~~
17 ~~both the treatment and disposal facilities shall be documented;~~

18 ~~—— (g) For an exemption pursuant to section 367.022(7), Florida~~
19 ~~Statutes, a statement that it provides service solely to members~~
20 ~~who own and control it; and stating that it provides water service,~~
21 ~~wastewater service or both.~~

22 ~~—— 1. When the applicant is a condominium formed pursuant to the~~
23 ~~Condominium Act, Chapter 718, Florida Statutes, it must provide:~~

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2 ~~— a. A copy of the certificate obtained from the Secretary of~~
3 ~~State showing that it is formed under Chapter 718, Florida~~
4 ~~Statutes;~~

5 ~~— b. A statement as to whether the applicant's articles of~~
6 ~~incorporation and bylaws contain the requirements for turnover of~~
7 ~~control of the condominium to the nondeveloper members as set out~~
8 ~~in Chapter 718, Florida Statutes. If turnover of control has not~~
9 ~~occurred, a statement as to the date turnover of control to the~~
10 ~~nondeveloper members is expected to occur.~~

11 ~~— 2. When the applicant is a cooperative formed pursuant to the~~
12 ~~Cooperative Act, Chapter 719, Florida Statutes, it must provide:~~

13 ~~— a. A copy of the certificate obtained from the Secretary of~~
14 ~~State showing that it is formed under Chapter 719, Florida~~
15 ~~Statutes;~~

16 ~~— b. A statement as to whether the applicant's articles of~~
17 ~~incorporation and bylaws contain the requirements for turnover of~~
18 ~~control of the cooperative to the nondeveloper members as set out~~
19 ~~in Chapter 719, Florida Statutes. If turnover of control has not~~
20 ~~occurred, a statement as to the date turnover of control to the~~
21 ~~nondeveloper members is expected to occur.~~

22 ~~— 3. When the applicant is a nonprofit corporation formed~~
23 ~~pursuant to Chapter 617, Florida Statutes, it must provide:~~

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~~a. The articles of incorporation as filed with the Secretary of State and the bylaws which documents must demonstrate that it provides service solely to members who own the corporation;~~

~~b. A description of the voting rights and their location in the articles of incorporation and the bylaws. The voting rights shall be one vote per unit of ownership or other voting rights if the Commission finds they are fair and nondiscriminatory so that members have equitable control of the corporation.~~

~~c. In circumstances where the applicant is a nonprofit corporation formed by a developer pursuant to Chapter 617, Florida Statutes, it must provide documentation showing that control has passed or, if not, the circumstances under which control of the corporation will pass to the nondeveloper members. The time must not exceed seven years from the date of incorporation unless the Commission finds that special circumstances justify a longer time.~~

~~(h) For an exemption pursuant to Section 367.022(8), Florida Statutes, a statement from the reseller that service is provided at a rate or charge that does not exceed the actual purchase price; stating that the reseller is aware of the requirements of Rule 25-30.111, Florida Administrative Code; stating that the reseller is aware of the requirements of Section 367.122, Florida Statutes, and Rules 25-30.262, .263, .264, .265, .266 and .267, Florida Administrative Code, relating to examination and testing of meters; and stating whether it provides water service, wastewater service~~

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2 ~~or both. The reseller must also provide the name of the utility~~
3 ~~providing service to it and that utility's current rates and~~
4 ~~charges. The reseller must submit a schedule of all of its proposed~~
5 ~~rates and charges, an explanation of the proposed method of billing~~
6 ~~customers, separately, for both water and wastewater, and a~~
7 ~~schedule showing that the amount billed will not exceed the amount~~
8 ~~paid for water, wastewater, or both;~~

9 ~~—— (i) For an exemption pursuant to Section 367.022(9), Florida~~
10 ~~Statutes, a statement from the owner of the wastewater system that~~
11 ~~the system is primarily for the treatment of wastewater other than~~
12 ~~domestic wastewater, such as runoff and leachate from areas that~~
13 ~~receive pollutants associated with industrial or commercial~~
14 ~~storage, handling or processing, and identifying the principal~~
15 ~~source or nature of such wastewater;~~

16 ~~—— (j) For a nonjurisdictional finding pursuant to Section~~
17 ~~367.021(12), Florida Statutes, a statement from the system owner~~
18 ~~stating that it does not charge for providing utility service,~~
19 ~~specifying how operational costs of providing service are treated~~
20 ~~or recovered, and stating whether it provides water service,~~
21 ~~wastewater service, or both.~~

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23 Specific Authority 350.127(2), 367.121(1) FS.

24 Law Implemented 367.021(12), 367.022, 367.031 FS.

25 History--New 1-5-92, Amended 11-30-93, 2-15-96.

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