

FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

M E M O R A N D U M

APRIL 2, 1997

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

FROM: DIVISION OF LEGAL SERVICES (K. JOHNSON) *KJ*
DIVISION OF WATER & WASTEWATER (GALLOWAY) *LJ*

RE: DOCKET NO. 961529-WU - FLORIDA PUBLIC UTILITIES COMPANY
(FERNANDINA BEACH SYSTEM) - REQUEST FOR APPROVAL OF
AGREEMENT WITH CITY OF FERNANDINA BEACH, AND TARIFF
REVISION TO ALLOW FOR DISCONTINUANCE OF WATER SERVICE TO
ANY CUSTOMER OWING UNPAID SEWER BILLS TO CITY PURSUANT TO
SECTION 159.18(2), F.S.

AGENDA: APRIL 14, 1997 - REGULAR AGENDA - PROPOSED AGENCY ACTION-
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 90 day grant/deny date; April 23, 1997

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\961529WU.RCM

CASE BACKGROUND

Florida Public Utilities Company (FPUC or utility) provides electric, gas and water service to various areas in Florida. The Fernandina Beach division in Nassau County, furnished electricity and water service to approximately 11,100 electric customers and 5,650 water customers as of December 31, 1995. In its 1995 annual report, the utility recorded operating revenues of \$1,595,741 for water service and net operating income of \$279,410. The Fernandina Beach division is the sole division within the company providing water service. Water rates were last established for this utility in Order No. 17444, issued on April 20, 1987, in Docket No. 860662-WU.

On December 24, 1996, FPUC filed with the Commission a tariff revision along with a request for approval of an agreement with the City of Fernandina Beach to allow FPUC to discontinue water service to any customer who does not pay its sewer bills to the City.

DOCUMENT NUMBER-DATE

03382 APR-25

FPSC-RECORDS/REPORTING

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After an initial review of the request, staff believed that it would need more than the 60 day statutory time limit imposed on the Commission for tariff filings, in order to make a recommendation in the docket. Consequently, staff requested the utility to either withdraw the tariff or to waive the 60 day deadline so as to avoid a staff recommendation to suspend the tariff, pursuant to Section 367.091(5), Florida Statutes. As a result, on January 23, 1997, the utility waived the 60 day statutory time limit for tariff filings. In response to staff's request for further information, the utility submitted a copy of the unexecuted agreement between the City of Fernandina Beach on February 11, 1997.

Staff's further review of the utility's filing determined that the agreement between FPUC and the City may not meet the requirements of Rule 25-30.320(2)(g), Florida Administrative Code. Staff advised the utility of the possibility of a rule waiver as a remedy, pursuant to Section 120.542, Florida Statutes. Staff then referred the utility's attorney to Chapter 120, Florida Statute's rule waiver provision. Staff also provided the attorney with copies of the proposed uniform rules and referred the attorney to the statute section governing rule waiver requests. Staff further provided the utility's attorney with a copy of Commission Order No. PSC-92-0866-FOF-WU, which dealt with the same type of contract which FPUC and the City of Fernandina are contemplating entering into.

Following staff's discussion with the utility, on January 23, 1997, the utility filed a petition for waiver of Rule 25-30.320(2)(g), Florida Administrative Code. Staff's recommendation regarding the utility's petition follows.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Florida Public Utilities Company's Petition for Waiver of Rule 25-30.320(2)(g), Florida Administrative Code?

RECOMMENDATION: No. The Commission should deny FPUC's Petition for Waiver of Rule because the petition does not meet the requirements of Section 120.542, Florida Statutes. (K. JOHNSON)

STAFF ANALYSIS: As stated earlier, FPUC filed a request for approval of agreement with the City of Fernandina Beach to allow FPUC to discontinue water service to any customer who does not pay its sewer bills to the City. Rule 25-30.320(2)(g), Florida Administrative Code, requires *inter alia*, that a utility may refuse or discontinue service for nonpayment of bills for utility service by the same or an affiliated utility after the customers are provided notice. On January 23, 1997, FPUC filed a petition for waiver of Rule 25-30.320(2)(g), Florida Administrative Code, pursuant to Section 120.542, Florida Statutes, because staff believed that FPUC would not meet the requirements of the rule as it stands due to the fact that FPUC is not the same utility or affiliated with the utility (City of Fernandina Beach) whose bills would be unpaid by the customers.

Section 120.542, Florida Statutes, authorizes agencies to grant variances and waivers to the requirements of their rules, if petitions for such variances and waivers are consistent with the requirements of the statute. This statute requires the agency to grant the variance or waiver if 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 if "the application of the rule would create a substantial hardship or would violate principles of fairness." Section 120.542(2), Florida Statutes. The statute goes on to define "substantial hardship" as a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. According to the statute, "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(7), Florida Statutes, requires the Commission to issue an order in writing granting or denying the petition and stating the relevant facts and reasons for the Commission's decision. The Commission's decision must be supported by competent substantial evidence.

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Pursuant to Section 120.542(6), Florida Statutes, the Commission provided notice to the Department of State, which published notice of the waiver request in the Florida Administrative Weekly on February 7, 1997. The Commission received no comments during the 30 day comment period, which ended on March 10, 1996. The Commission must rule on the petition by April 23, 1997, pursuant to Section 120.542(7), Florida Statutes.

Section 120.542(4) requires agencies to advise persons who inquire about relief from the rule of the remedies available through this statute and to provide copies of the statute section and uniform rules, if requested. In accordance with this requirement, staff informed FPUC's attorney of this new statutory provision, provided the attorney with copies of the proposed uniform rules, referred the attorney to the statute section governing rule waiver requests and even provided a copy of a Commission order that dealt with the same type of contract which FPUC and the City of Fernandina are contemplating entering into. Staff believes that it afforded FPUC all the assistance and opportunity reasonably possible in order to submit a more than adequate petition for rule waiver.

In its petition, FPUC refers to Section 159.18(2), Florida Statutes, as authority for it and the City of Fernandina Beach to enter into a contract whereby FPUC may shut off the water supply to its customers who do not pay their sewer bills to the City of Fernandina Beach utility. Section 159.18(2), Florida Statutes, provides:

Any municipality shall have the power to enter into valid and legally binding contracts with any person, public or private corporation, board or other body supplying water to any premises served by the sewer system or facilities of the municipality for the shutting off and discontinuing of the supply of water to such premises as long as any charges for the sewer services or facilities of the municipality are unpaid, under such terms and conditions as shall be mutually agreed upon, including provisions for the billing and collecting of the sewer charges of the municipality by the owners of the water facilities at the same time water charges are billed and collected by such owners of the water facilities.

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In addition, FPUC states that the rule waiver is intended to be temporary only throughout the life of the contract which the City wishes to enter into with FPUC.

As mentioned earlier, Section 120.542, Florida Statutes, requires a petition for rule waiver to demonstrate that the purpose of the underlying statute will be achieved and that the rule would create a substantial hardship on the petitioner or would violate principles of fairness. The underlying statute pertaining to the rule in this instance is Section 367.121, Florida Statutes, which charges the Commission with the responsibility, *inter alia*, to prescribe fair and reasonable service rules to be observed by each utility. FPUC's response to the statutory requirement of explaining the reason why the variance or waiver would serve the purposes of the underlying statute, simply states that the waiver of Rule 25-30.320(2)(g), Florida Administrative Code, "would not necessarily go against the dictates of Chapter 367.121(1)(a) and would be in concert with Chapter 159.18(2)." Staff believes this statement to be an inadequate justification of how the rule waiver would serve the purpose of the underlying statute. Furthermore, Section 159.18, Florida Statutes, is not the statute underlying the rule which is the subject of the rule waiver petition, nor does the Commission have the authority to administer Chapter 159, Florida Statutes. Section 367.121, Florida Statutes, is the correct underlying statute for which the petitioner must demonstrate will be achieved by other means.

FPUC's petition does not allege nor address Chapter 120, Florida Statutes' requirement that the petition demonstrate either a substantial hardship or a violation of the principles of fairness as applied to the petitioner. Therefore, staff cannot analyze this statutory requirement. Furthermore, staff believes that FPUC's failure to address this integral statutory requirement warrants a denial of the rule waiver petition on its face for failure to plead its case.

Based on the foregoing, staff believes that FPUC has not met its statutory burden in order to be granted a rule waiver under Section 120.542, Florida Statutes. Accordingly, staff recommends that the Commission deny FPUC's petition for waiver of Rule 25-30.320(2)(g), Florida Administrative Code.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, this docket should remain open pending further review by staff of FPUC's request for a tariff revision and approval of the agreement between FPUC and the City of Fernandina Beach. (K. JOHNSON)

STAFF ANALYSIS: Since the utility's request for approval of the tariff revision and approval of the agreement between FPUC and the City of Fernandina Beach is still pending, this docket should remain open upon expiration of the protest period.