

FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

MEMORANDUM

JUNE 3, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PAUGH) *RVE JGP*
DIVISION OF ELECTRIC AND GAS (BANKS) *CRB* *JOJ*

RE: DOCKET NO. 970360-GU - PETITION FOR WAIVER OF PENALTY FOR
LATE PAYMENT OF REGULATORY ASSESSMENT FEES PURSUANT TO
RULE 25-7.0131, F.A.C, BY CITY GAS COMPANY OF FLORIDA.

AGENDA: JUNE 10, 1997 - REGULAR AGENDA - PROPOSED AGENCY ACTION -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 06/10/97 - STATUTORY DEADLINE FOR DECISION

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\9703602.RCM

CASE BACKGROUND

Pursuant to Sections 350.113(3) and 366.14, Florida Statutes and Rule 25-7.0131, Florida Administrative Code, City Gas Company of Florida's (City Gas or company) regulatory assessment fee for the last six months of 1996 was due January 30, 1997. Fees are considered timely paid if postmarked on the due date. Rule 25-7.0131(3), Florida Administrative Code. However, City Gas did not postmark its fee to the Commission until January 31, 1997, one day late. According to City Gas, although a check in the amount of \$114,929.79 was ready on January 30, 1997, the fee was not postmarked on that day due to a delay in receiving the data necessary to complete the return on January 30. By letter dated February 20, 1997, the Bureau of Fiscal Services notified the company that since its regulatory assessment fee was one day late, penalty and interest in the amount of \$6,895.80 was due in accordance with Section 350.114(4), Florida Statutes.

DOCUMENT NUMBER-DATE

05521 JUN-36

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On March 20, City Gas filed a petition for waiver of penalty. In support of its petition, City Gas asserts that the computer software changeover caused an unusually heavy workload and that the oversight was excusable neglect by personnel. "This late filing represents an isolated incident, and City Gas has always been prompt in its past filings of this fee....City Gas respectfully submits that this (the amount of the penalty) is simply an inequitable result under the circumstances in the filing of the fee." (Petition, para. 13)

The waiver petition was filed on March 20, 1997. No comments were submitted during the comment period which ended May 2, 1997. The statutory deadline for the Commission's decision regarding this Petition for Waiver is June 18, 1997.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission waive the penalty assessed against City Gas Company of Florida for paying its regulatory assessment fee one day late?

RECOMMENDATION: No. The regulatory assessment fee penalty statute contains no provision for waiver. In addition, City Gas has not met the statutory criteria for a rule waiver set forth in Chapter 120, Florida Statutes.

STAFF ANALYSIS: On March 20, 1997, City Gas filed a Petition for waiver of the regulatory assessment fee penalty. In the Petition, City Gas stated that the delay was caused by the company's ongoing changeover to year 2000 complaint, multi-functional accounting and financial software. (Petition, para. 6) The Petition contains no legal citation that would authorize the requested relief.

Section 350.113(3), Florida Statutes, provides that "[e]ach regulated company under the jurisdiction of the commission...shall pay to the commission within 30 days following the end of each 6-month period..." a regulatory assessment fee. Section 364.336, Florida Statutes, establishes the maximum fee the Commission may charge and reiterates that it is due "within 30 days following the end of each 6-month period..." Furthermore, Rule 25-7.0131(2), Florida Administrative Code, and the regulatory assessment form incorporated into the rule by reference state that the fee is due each January 30 for the period July 1 through December 31 for the

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preceding year. Finally, the Commission complied with the requirement in Section 350.113(4), Florida Statutes, by notifying City Gas of the due date at least 45 days prior to the fee being due.

In addition, Section 350.113(4), Florida Statutes, mandates that if a regulatory assessment fee is paid late, the Commission must charge a penalty plus interest:

If any regulated company fails to pay the required fee by such date, the commission shall estimate the amount of fee due from such information as it may be able to obtain from any source and shall add 5 percent of such amount to the fee as a penalty if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during the time in which the failure continues, not to exceed a total penalty of 25 percent. The commission shall collect the fee and penalty, plus interest and all costs of collection, from the regulated company. However, no penalty shall be added to the fee if a return is made and the fee is paid before the date fixed in the notice given by the commission.

Section 350.113(4), Florida Statutes

The statute also provides that, for good cause shown by written request, the Commission may extend the period for paying the fee for up to 30 days. If an extension is granted, a charge is levied against the utility based on a percentage of the fee to be collected. Section 350.113(5), Florida Statutes.

Rule 25-7.0131, Florida Administrative Code prescribes the procedures for filing regulatory assessment fees. The rule is mandatory and explicit. Subsection (1) provides that each municipal and investor-owned gas utility shall pay a regulatory assessment fee and sets forth the percentages of gross operating revenue that shall be paid. Subsections (2) and (3) establish the semi-annual filing dates, state that fees are considered timely paid if properly addressed and postmarked on the due date and

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provide alternative due dates in the event the filing date falls on a weekend or holiday. Subsections (5) and (6) recognize that a utility may not always be able to calculate the full amount of the fee and provide for partial payment, with interest, and a 30 day full compliance period. The rule also establishes procedures for a 30 day extension for good cause. Rule 25-7.0131(6)&(7), Florida Administrative Code. Finally, the rule specifies that delinquency "begins with the first calendar day after any date established as the due date either by operation of this rule or by an extension pursuant to this rule." Rule 25-7.0131(8), Florida Administrative Code. The regulatory assessment fee statute and rule have no provisions for waiver of the penalty.

The penalty calculation section of the regulatory assessment fee rule references the penalty section of the statute. The rule states: "[a] penalty, as set out in s. 350.113, F.S. shall apply to any such delinquent amounts." Rule 25-7.0131(8)(a), Florida Administrative Code. Therefore, any request for a waiver of the penalty is a request for a waiver of the statute.

Constitutional law requires that only the legislature can repeal, amend or modify an unambiguous statute. The principle of separation of powers of government in the Florida Constitution, which divides powers among the legislative, executive and judicial branches, confines each branch to its own proper function and prohibits encroachment by one branch of government upon another. The right to pass statutes includes the power to repeal or modify them, provided no right secured by constitutional provisions is thereby violated. Ponder v. Graham, 4 Fla. 23 (Fla. 1851). It is the function of the legislature and not the courts or administrative agencies to change the law. 1 Fla. Jur. 2d, Administrative Law, Section 32. The grant of a waiver of the regulatory assessment fee penalty statute, in the absence of any waiver provisions, express or implied, contained in the statute, would be a modification of the statute. This is a function reserved solely for the legislature. In addition, there is no basis for interpretation of Section 350.113(4), Florida Statutes. The statute is clear and unambiguous on its face. If the terms and provisions of a statute are plain, there is no room for administrative interpretation. Southeastern Utilities Service Co. v. Redding, 131 So. 2d 1 (Fla. 1950).

Notwithstanding the foregoing, if the Commission believes it has jurisdiction to grant a waiver of the regulatory assessment fee penalty, it should not do so because City Gas has not met the

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statutory criteria for rule waivers set forth in Chapter 120, Florida Statutes. Effective October 1, 1996, Florida's Administrative Procedure Act has been substantially amended. Among the amendments are new requirements for rule waivers. Section 120.542, Florida Statutes, mandates threshold proofs and notice provisions for variances and waivers from agency rules. Subsection (2) of the statute states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statutes 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. 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. 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.

Section 120.542(2), Florida Statutes.

In addition to establishing "substantial hardship" and that the "principles of fairness" would be violated, a petition for a waiver must specify: (1) the rule from which a waiver is requested; (2) the type of action requested; (3) the specific facts that would justify a waiver; and (4) the reason why the waiver requested would serve the purposes of the underlying statute. Section 120.542(5)(a)-(d), Florida Statutes.

The instant Petition addresses only a portion of the requirements of Section 120.542, Florida Statutes. The Petition identifies the rule from which the waiver is requested, the type of action requested, and facts to justify a waiver. However, the Petition fails to allege a reason why the waiver requested would serve the purposes of the underlying statute. More significant, there is no showing in the Petition that application of the regulatory assessment fee penalty provisions will create a

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substantial hardship for City Gas. "Substantial hardship" is defined in the statute as a demonstrated economic, technological, legal or other type of hardship. Section 120.542(2), Florida Statutes. In addition, there is no showing in the Petition that application of the assessment fee penalty provisions to City Gas will violate the principles of fairness. As set forth in the statute, the "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. Id. (emphasis added)

Section 120.542, Florida Statutes is the exclusive method by which the Florida Public Service Commission may waive or grant a variance from a rule. "This section does not authorize agencies to grant variances or waivers to statutes. This section is supplemental to, and does not abrogate, the variance or waiver provisions in any other statute." Section 120.542(1), Florida Statutes. As stated, the regulatory assessment fee penalty statutes do not contain any waiver or variance provisions. Therefore, as previously stated, if the rule were waived, the statute would effectively be waived.

The Commission has previously granted waivers of regulatory assessment fee penalties in certain situations. In In Re: Petition for Declaratory Statement, or Alternatively, for Waiver of Penalty Imposed for Late Payment of Regulatory Assessment Fees by BellSouth Telecommunication, Inc., Order No. PSC-96-0569-FOF-TL, Docket No. 960191, May 1, 1996, BellSouth filed its regulatory assessment fee one day late and requested a waiver of the penalty citing illnesses that resulted in absences of office personnel and an unusually heavy workload as the basis for the waiver request. The Commission found that those circumstances constituted excusable neglect and waived the penalty. In addition, the Commission ruled that GTE had substantially complied with the requirements of the Florida Administrative Code when the company filed its regulatory assessment fee one day late where the filing date fell on a Saturday. In In Re: Request for Ruling or In The Alternative, Petition for Declaratory Statement or Other Appropriate Action Regarding Penalty Imposed by Florida Public Service Commission for Late Payment of Regulatory Assessment Fees by GTE Florida Inc. Order No. PSC-95-0364-FOF-FL, Docket No. 941196-TL, March 14, 1995. See also In Re: Petition for Determination That Regulatory Assessment Fees were Timely Submitted or, In the Alternative, Other Appropriate Relief, by Peoples Gas System, Inc. Order No. PSC-95-0496-FOF-GU, Docket No. 941233-GU, April 19, 1995. Staff notes,

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however, that all of the above-referenced waiver decisions were rendered prior to the effective date of the amended Administrative Procedure Act, October 1, 1996. Therefore, if the Commission believes it can waive the rule, these decisions are not precedent for the instant waiver request which is controlled by the new statutory requirements.

In sum, because City Gas has failed to meet the statutorily mandated threshold proofs set forth in Chapter 120, Florida Statutes: (1)the reason the waiver requested would serve the purposes of the underlying statute; (2)substantial hardship; and (3)violation of principles of fairness, as well as the lack of waiver provisions in the penalty statute, the Petition For Waiver of Penalty For Late Payment of Regulatory Assessment Fees should be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, if no protest is filed within 21 days of the issuance of this order.

STAFF ANALYSIS: Pursuant to Rule 25-22.029(4), Florida Administrative Code, any person whose substantial interests are affected by the proposed agency action shall have 21 days after the issuance of the order to file a protest. If no timely protest is filed, the docket should be closed.