

FLORIDA PUBLIC SERVICE COMMISSION
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Tallahassee, Florida 32399-0850

MEMORANDUM

JULY 24, 1997

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FPSC - Records/Reporting

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

FROM: DIVISION OF LEGAL SERVICES (VACCARO) *[Signature]*
DIVISION OF WATER & WASTEWATER (GALLOWAY) *[Signature]*

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: AUGUST 5, 1997 - REGULAR AGENDA - PROPOSED AGENCY ACTION-
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 90 DAY GRANT/DENY DATE; SEPTEMBER 1, 1997

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\961529AW.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 11,600 electric customers and 5,800 water customers as of December 31, 1996. In its 1996 annual report, the utility recorded operating revenues of \$1,854,192 for water service and net operating income of \$388,176. 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.

Prior to December 24, 1996, FPUC negotiated a contract with the City of Fernandina Beach (City) whereby FPUC would perform the billing, collecting and accounting services for the City's sewer and sanitation services. This contract contained a provision by which FPUC would request Commission approval to discontinue the utility's water service for nonpayment of the City's sewer service

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FPSC-RECORDS/REPORTING

DOCKET NO. 961529-WU
DATE: JULY 24, 1997

charges. As a result thereof, on December 24, 1996, FPUC filed with the Commission a tariff revision, requesting approval of the agreement with the City to discontinue water service to any customer who does not pay its sewer bills to the City.

After an initial review of the request, staff 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. Therefore, 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.

Pursuant to Section 120.542(4), Florida Statutes, 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 Order No. PSC-92-0866-FOF-WU, which dealt with the same type of contract into which FPUC and the City of Fernandina are contemplating entering.

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. On February 11, 1997, in response to staff's request for further information, the utility submitted a copy of the unexecuted agreement between the City. On April 2, 1997, staff filed a recommendation to deny the utility's requested rule waiver. Prior to the Commission's consideration of the recommendation, on April 14, 1997, FPUC filed a Notice of Withdrawal of Rule Waiver Petition. On June 3, 1997, the utility filed an Amended Petition for Waiver of Rule 25-30.320(2)(g), Florida Administrative Code. Staff's recommendation regarding the utility's amended petition follows.

DOCKET NO. 961529-WU
DATE: JULY 24, 1997

DISCUSSION OF ISSUES

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

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

STAFF ANALYSIS: As stated earlier, FPUC filed a request for approval of agreement with the City 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, in that FPUC is not the same utility as the City and does not appear to be an affiliate of the City. FPUC withdrew its petition on April 14, 1997 and filed an amended petition on June 3, 1997.

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(8), 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.

DOCKET NO. 961529-WU
DATE: JULY 24, 1997

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. The Commission received no comments during the 30 day comment period. The Commission must rule on the amended petition by September 1, 1997, pursuant to Section 120.542(8), Florida Statutes.

As previously stated, 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 relating to another utility that dealt with the same type of contract which FPUC and the City of Fernandina are contemplating entering into. Staff provided FPUC further guidance regarding the rule waiver requirements set forth under the statute prior in anticipation of receiving FPUC's amended petition.

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 sets forth the powers of the Commission. Section 367.121(1)(c), Florida Statutes, in part, provides the Commission the following authority:

To prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and to prescribe service rules to be observed by each utility. . . .
(Emphasis added.)

The highlighted portion of the underlying statute specifically applies to Rule 25-30.320, Florida Administrative Code, which sets forth the circumstances under which a Commission-regulated utility is authorized to refuse or discontinue service.

As required by Section 120.542, Florida Statutes, FPUC's amended petition provided a statement explaining why the purposes of the underlying statute would be achieved by the utility's requested waiver. FPUC states that a waiver of Rule 25-

DOCKET NO. 961529-WU
DATE: JULY 24, 1997

30.320(2)(g), Florida Administrative Code, serves the purpose of the underlying statute, because the waiver "would not go against the dictates of Chapter 367.121(1)(a)" (sic). As further grounds, FPUC states that the water shut-off agreement "does not effect (sic) the fair and reasonable rates and charges and contributes greatly to the standard of quality of service [FPUC] can offer its customers."

Staff believes that FPUC's assertions do not adequately demonstrate that its requested rule waiver serves the purpose of the underlying statute. First, the utility's statement that the waiver "would not go against the dictates" of the statute merely shows that the requested waiver does not contradict the underlying statute, not that it supports the statute's purpose. Second, FPUC's statement that the water shut-off agreement "does not affect the fair and reasonable rates and charges and contributes greatly to the quality of service" focuses upon those provisions of Section 367.121, Florida Statutes, which do not apply to the rule. Therefore, staff believes that the Commission should deny FPUC's amended petition for rule waiver on this basis.

However, if FPUC's amended petition did adequately demonstrate that waiver of the rule would support the purpose of the underlying statute, the utility would still have to demonstrate that application of the rule creates a substantial hardship to the utility or violates principles of fairness. FPUC alleges a number of hardships which it states will affect its customers, the City and FPUC, if the utility cannot obtain its requested waiver. Because Section 120.542, Florida Statutes, requires a demonstration of substantial hardship to the person requesting the waiver, staff's analysis only focuses upon whether the utility will experience substantial hardship. FPUC alleges the following hardships.

1. There would be no ability to turn off either sewer or sanitation accounts should a customer indicate payment should be credited to his electric/water account.
2. It would be difficult to explain to a customer how his payment were applied if a known ratio procedure was not in effect, thus creating a much heavier burden on the utility in explaining customer inquiries.

3. The effectiveness of the delinquent notice and collection procedure is very suspect when a known payment ratio procedure is not mandatory. The delinquent notice cannot be designed to indicate the amount of each receivable in question or the customer can ignore the unenforceable amount (sewer/sanitation). This will require the utility to send out a notice that the entire bill (water, electric, sewer/sanitation) is due, which will lead to customer inquiries regarding calculation of the amount due. The utility will require additional labor hours to answer customer inquiries.
4. The bill design must be such that each total accounts receivable is not shown but buried in the total of the bill, which will lead to customer inquiries and require inefficient use of utility office personnel to answer those inquiries.
5. There is an inability to indicate exactly how a deposit is applied on a final bill, because each individual receivable balance is not shown. This leads to more questions requiring additional utility time to process each account.
6. There would be an inability to limit the amount of history required to support a customer's analysis of his current bill, due to the possibility that a customer might choose to never have any of his payments applied to sewer/sanitation. Each utility contract is for thirty years. Failure to limit account history would require additional online disk capacity for records and could result in substantial utility clerical time to analyze such history, in the event of customer inquiries.

Staff has spent considerable time analyzing FPUC's arguments regarding its alleged hardships in the absence of its requested rule waiver and finds the utility's arguments somewhat confusing. FPUC's arguments appear to focus on hardships related to not being able to implement a ratio procedure billing system. Staff does not see how this relates to FPUC's ability or inability to turn off water service for lack of payment for the City's sewer/sanitation system.

DOCKET NO. 961529-WU
DATE: JULY 24, 1997

However, to the extent that FPUC's arguments may relate to application of the rule in question, staff believes that the utility has not shown a substantial hardship. For example, FPUC alleges hardship to the City in not being paid for its services. This is not a factor for consideration under Section 120.542, Florida Statutes. Regarding utility hardship, FPUC suggests customer actions which might cause the utility additional time and resources in processing inquiries and keeping records. FPUC has provided no evidence to substantiate that this will occur.

Staff is concerned specifically with alleged hardships Nos. 3, 4 and 5. Staff believes that the water charges regulated by this Commission should be shown as a separate item from the sewer charges, not regulated by this Commission. Staff is concerned that the regulated portion of customer's bills should be kept separate and distinct from all non-regulated portions of the bill. These concerns will be addressed in the subsequent recommendation addressing approval or denial of FPUC's tariff request. Staff believes that FPUC has created these potential "hardships" by entering into its billing contract with the City. There is no indication that the utility was forced into the contract. Therefore, staff believes that the utility has not demonstrated substantial hardship from the application of Rule 25-30.320(2)(g), Florida Administrative Code. In addition, FPUC has made no allegations regarding violation of principles of fairness from application of the rule.

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.

DOCKET NO. 961529-WU
DATE: JULY 24, 1997

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. Upon expiration of the 21 day 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. (VACCARO)

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.