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MEMORANDUM

JANUARY 22, 1998

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

FROM: DIVISION OF LEGAL SERVICES (FLEMING) *JF*
DIVISION OF WATER AND WASTEWATER (REDEMANN) *PPR* *33M/20W*

RE: DOCKET NO. [REDACTED] - APPLICATION FOR AMENDMENT OF
CERTIFICATE NO. 401-W TO ADD TERRITORY IN HIGHLANDS
COUNTY BY PLACID LAKES UTILITIES, INC.
COUNTY: HIGHLANDS

AGENDA: FEBRUARY 3, 1998 - REGULAR AGENDA - PROPOSED AGENCY
ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 90 DAY GRANT/DENY DATE; March 2, 1998

SPECIAL INSTRUCTIONS: NONE

FILE LOCATION: I:\PSC\LEG\WP\971204.RCM

CASE BACKGROUND

Placid Lakes Utilities, Inc. (Placid Lakes or utility) is a Class C utility which provides water service to 2,840 customers in Highlands County. The utility is 100% owned by Lake Placid Holding Company, which is the primary developer of Placid Lake Subdivision.

On September 15, 1997, Placid Lakes filed an application for amendment of Certificate No. 401-W to add territory in Highlands County. Pursuant to Rule 25-30.036(3)(e), Florida Administrative Code, the utility is required to provide a description of the proposed extended area to be served using township, ranges, section, and metes and bounds. The utility did not use metes and bounds in a portion of its description. Staff found the application for amendment of certificate to be deficient. Staff informed the utility that it had two options. One was to change the format and renote, and the second was to file a petition for a variance.

Staff advised the utility of the possibility for a variance of the rule as a remedy, pursuant to Section 120.542, Florida Statutes. Following staff's discussion with the utility, on December 1, 1997, the utility filed a Petition for Variance of Rule

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25-30.036(3)(e), Florida Administrative Code. This recommendation addresses the utility's request for a variance.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Placid Lakes Utilities, Incorporated's Petition for Variance of Rule 25-30.036(3)(e), Florida Administrative Code?

RECOMMENDATION: Yes. The Commission should grant Placid Lake's Petition for Variance. (FLEMING, REDEMANN)

STAFF ANALYSIS: As stated earlier, Placid Lakes filed an application for amendment of Certificate No. 401-W to add territory in Highlands County. In its application, the utility is required to provide a description of the territory proposed to be served, using township, range, section, and metes and bounds, pursuant to Rule 25-30.036(3)(e), Florida Administrative Code. Placid Lakes did not submit a territory description using metes and bounds; instead, the utility used township, range, section, streets, lots, and blocks for the portion of its description. Therefore, staff found the application for amendment of certificate to be deficient. Staff informed the utility that it had two options. One was to change the format and renotice, and the second was to file a petition for a variance. On December 1, 1997, Placid Lakes filed a petition for variance of Rule 25-30.036(3)(e), Florida Administrative Code, pursuant to Section 120.542, Florida Statutes.

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.

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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.

Pursuant to Section 120.542(6), Florida Statutes, the Commission provided notice to the Department of State, which published notice of the variance request in the Florida Administrative Weekly. The Commission received no comments during the 14 day comment period. The Commission must rule on the petition by March 2, 1998, pursuant to Section 120.542(8), 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 Placid Lakes' contact person of this new statutory provision and provided a copy of the statute section governing variance requests.

As mentioned earlier, Section 120.542, Florida Statutes, requires a petition for rule variance 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 367.045, Florida Statutes, which sets forth the application and amendment procedures. Section 367.045(2)(b), Florida Statutes, in part, provides the following:

When a utility applies for an amended certificate of authorization from the Commission it shall provide all information required by rule or order of the Commission, which may include a description of the area sought to be deleted or added to the area described in the applicant's current certificate of authorization.

The highlighted portion of the underlying statute specifically applies to Rule 25-30.036(3)(e), Florida Administrative Code, which in part requires an application for amendment of certificate of authorization to extend or delete service to provide a description of the proposed territory in township, range, section, and metes and bounds.

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As required by Section 120.542, Florida Statutes, Placid Lakes provided a statement explaining why the purpose of the underlying statute would be achieved by the utility's requested variance. Placid Lakes alleges that a variance of Rule 25-30.036(3)(e), Florida Administrative Code, serves the purpose of the underlying statute, because customers receive their real estate taxes in the form of County section, township, and ranges and would more readily recognize that form over the usage of a metes and bounds description. Staff notes that the description submitted by the utility uses township, section, range, as well as streets, lots, and blocks. Therefore, the ultimate resolution of this amendment will allow staff to map this territory.

Staff believes that Placid Lake has adequately demonstrated that its requested variance serves the purpose of the underlying statute. The utility has substantially complied with the rule by providing a description of the proposed extended area by using township, range, and section references. Staff believes that the customers will be able to ascertain whether they are affected or not, by the description submitted by the utility.

However, the utility still has to demonstrate that application of the rule creates a substantial hardship to the utility or violates principles of fairness. Placid Lakes alleges that it is a small utility, and it would be cost prohibitive to survey 1,000 acres of property to provide the metes and bounds description as required in Rule 25-30.036(3)(e), Florida Administrative Code, because it would be very expensive to solicit the expertise of lawyers and engineers to figure where the property begins and ends. Staff believes that the utility has shown a substantial hardship by its demonstration of an economic, technological, and legal hardship.

Based on the foregoing, staff believes that Placid Lakes has met its statutory burden in order to be granted a rule variance under Section 120.542, Florida Statutes. Accordingly, staff recommends that the Commission approve Placid Lake's petition for variance of Rule 25-30.036(3)(e), Florida Administrative Code.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. Upon expiration of the 21 days 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 Placid Lakes' application for amendment of Certificate No. 401-W to add territory in Highlands County. (FLEMING)

STAFF ANALYSIS: Since the utility's application for amendment of Certificate No. 401-W to add territory in Highlands County is still pending, this docket should remain open upon expiration of the protest period.