

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

MAY 7, 1998

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (VACCARO) *[Handwritten initials]*
DIVISION OF WATER AND WASTEWATER (HINES) *[Handwritten initials]*

RE: DOCKET NO. 980442-SU - PETITION FOR WAIVER OF RULE 25-30.110(3), (6) AND (7), F.A.C., ANNUAL REPORTS, BY PINE ISLAND COVE HOMEOWNER'S ASSOCIATION.

COUNTY: LEE

AGENDA: MAY 19, 1998 - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: JUNE 25, 1998

FILE LOCATION: I:\PSC\LEG\WP\980442.RCM

CASE BACKGROUND

Pine Island Cove Homeowners Association, Inc. (PIC or utility) is a Class C wastewater utility located in Lee County. The utility provides service to 317 customers, not all of which are members of the homeowners association. Based on the utility's 1996 annual report, PIC reported gross annual revenues of \$39,866, expenses of \$35,843 and a net operating loss of \$18,863.

On September 11, 1995, the utility filed its 1992, 1993 and 1994 annual reports. Pursuant to Rule 25-30.110(3), Florida Administrative Code, the utility's reports were due on March 31, 1993, 1994 and 1995, respectively. On February 10, 1998, Commission legal staff sent the utility a letter requesting that it pay penalties pursuant to Rules 25-30.110(6) and (7), Florida Administrative Code, for failure to timely file its 1992-1994 annual reports. A letter was also sent by the Division of Water

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and Wastewater on June 16, 1995, requesting that the utility file its 1994 annual report.

On February 16, 1998, the utility sent staff a letter requesting that the penalties be waived for good cause shown. Legal staff contacted the utility's attorney to inform her that petitions for rule waivers must be filed in accordance with Section 120.542, Florida Statutes. On March 27, 1998, the utility filed a Petition for Waiver of Rules 25-30.110(3), (6) and (7), Florida Administrative Code. This recommendation addresses PIC's petition for waiver.

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ISSUE 1: Should the Commission grant Pine Island Cove's Petition for Waiver of Rules 25-30.110(3), (6) and (7), Florida Administrative Code?

RECOMMENDATION: Yes. The Commission should grant Pine Island Cove's Petition for Waiver of Rules 25-30.110(3), (6) and (7), Florida Administrative Code, because the petition meets the requirements of Section 120.542, Florida Statutes. (VACCARO, HINES)

STAFF ANALYSIS: On March 27, 1998, PIC filed a petition for waiver of Rules 25-30.110(3), (6) and (7), Florida Administrative Code. The utility seeks relief from the requirement to pay penalties arising from its failure to file the utility's 1992-1994 annual reports in a timely manner. The utility indicates that the requested waiver is temporary, in that it relates solely to the penalties associated with the 1992-1994 annual reports.

Rule 25-30.110(3), Florida Administrative Code, requires utilities subject to the Commission's jurisdiction as of December 31 of any year to file an annual report for that year. The report is due by March 31 for the preceding year ending December 31. One extension of 30 days is automatically granted, but a further extension must be requested in writing by the utility and include a statement of good cause for the extension.

Rule 25-30.110(6), Florida Administrative Code, provides, in part, that a penalty shall be assessed against any utility that fails to file an annual report or request for an extension. Rule 25-30.110(7), Florida Administrative Code sets forth the calculation of the penalty. For Class C utilities, the rule provides a penalty of \$3 per day for each day the report is delinquent. PIC did not request an extension for filing its reports. PIC filed its 1992-1994 reports on September 11, 1995. Therefore, the utility owes \$4,761 in penalties calculated as follows: \$2,682 for 1992 (894 days x \$3); \$1,587 for 1993 (529 days x \$3); and \$492 for 1994 (164 days x \$3).

In its petition, the utility states that it is a small, not-for-profit corporation comprised of homeowners within Pine Island Cove. The utility states that the Board of Directors reasonably relied on its attorney and accountant to advise the board on all required utility filings. PIC states that it exercised due

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diligence in completing all filings in accordance with the professional advice received. PIC further states that the attorney and accountant are no longer employed by the utility. PIC states that upon being advised by Commission staff in 1995 of its delinquent status, the utility immediately retained an accounting firm to prepare and file its annual reports.

PIC states that the purpose of the underlying statutes has been achieved, because PIC has filed its 1992-1994 annual reports and has paid its associated regulatory assessment fees. Further, PIC states that it has since complied with the Commission's rules regarding annual reports. PIC also states that application of the rules will cause the utility to suffer substantial economic hardship.

Statutory Requirements

Pursuant to Section 120.542(6), Florida Statutes, on April 1, 1998, the Commission provided notice to the Department of State, which published notice of the waiver request in the Florida Administrative Weekly. After reviewing the petition, staff found no deficiencies. The Commission received no comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, the Commission is required to issue an order in writing granting or denying the petition for waiver, stating the relevant facts and reasons supporting the Commission's decision within 90 days after receipt of the original petition. The Commission must rule on PIC's petition by June 25, 1998.

Section 120.542(2), Florida Statutes, in pertinent parts, provides that "variances and waivers shall be granted when 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 that application of the rule would create a substantial hardship or would violate principals 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."

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The Underlying Statutes

The underlying statutes pertaining to the rules in this instance are Sections 367.121 and 367.161, Florida Statutes. Section 367.121(c), Florida Statutes, grants the Commission, in part, the power "to require such regular or emergency reports from a utility, including, but not limited to, financial reports, as the commission deems necessary. . . ." The purpose, in part, for requiring annual reports is to guarantee that a utility is not overearning and that the utility is paying the proper regulatory assessment fees. By filing its 1992-1994 annual reports, the utility has provided the necessary information for such determination. Staff's review of PIC's annual reports verified proper payment of its regulatory assessment fees. Further, staff found no evidence to suggest that the utility overearned from 1992 through 1994. Therefore, staff believes that the purpose of Section 367.121, Florida Statutes was achieved when the utility filed its reports.

Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have wilfully violated, any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission. As PIC states, the purpose of penalizing utilities for violating Commission rules is to encourage compliance with those rules. Staff agrees with the utility that following PIC's filing of its 1992-1994 annual reports, PIC has remained in compliance with Commission rules. In addition to timely filing its annual reports, the utility has paid all regulatory assessment fees. Therefore, staff believes that the purpose of Section 367.161, Florida Statutes, has been achieved.

Substantial Hardship

According to the utility's annual reports for the calendar years 1990-1996, PIC has suffered a total loss of \$249,319. Based on those losses, PIC states that payment of penalties for delinquent annual reports will cause a substantial hardship to the homeowners association. As discussed in the case background, PIC is a Class C utility. Given PIC's size and its reported losses, staff believes that the accrued penalty, or any fraction thereof, would cause a substantial economic hardship to the utility.

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Furthermore, staff notes that such a hardship could jeopardize the utility's ability to provide safe, efficient and sufficient service as required by Section 367.111(2), Florida Statutes.

Based on the foregoing, staff believes that PIC's petition for waiver should be granted, because the utility has met the requirements of Section 120.542, Florida Statutes, by demonstrating that a waiver of Rules 25-30.110(3), (6) and (7), Florida Administrative Code, would serve the purpose of Sections 367.121 and 367.161, Florida Statutes. Further, as required by Section 120.542, Florida Statutes, the utility has demonstrated that application of the rules would create a substantial hardship for the utility.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed if no person whose interests are substantially affected by the proposed action, files a protest within the 21-day protest period. (VACCARO)

STAFF ANALYSIS: This docket should be closed if no person whose interests are substantially affected by the proposed action, files a protest within the 21-day protest period.