

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for waiver of Rule 25-30.110(3), F.A.C., Records and Reports; 25-30.110(6), Annual Reports; and 25-30.110(7), F.A.C., Delinquent Reports, by Pine Island Cove Homeowners Association in Lee County.

DOCKET NO. 980442-SU
ORDER NO. PSC-98-0798-FOF-SU
ISSUED: June 8, 1998

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING PETITION FOR WAIVER OF
RULES 25-30.110(3), (6) AND (7), FLORIDA ADMINISTRATIVE CODE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

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, operation and maintenance 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,

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FPC-RECORDS/REPORTING

Administrative Code, the utility's reports were due on March 31, 1993, 1994 and 1995, respectively. On February 10, 1998, our 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 through 1994 annual reports. A letter was also sent by our Division of Water and Wastewater on June 16, 1995, requesting that the utility file its 1994 annual report.

On February 16, 1998, the utility sent our staff a letter requesting that the penalties be waived for good cause shown. Our 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.

PETITION FOR WAIVER

By its petition, the utility seeks relief from the requirement to pay penalties arising from its failure to file its 1992 through 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 these specific, 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 a 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 through 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).

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

Statutory Requirements

Pursuant to Section 120.542(6), Florida Statutes, on April 1, 1998, we provided notice to the Department of State, which published notice of the waiver request in the Florida Administrative Weekly. After reviewing the petition, we found no deficiencies. We did not receive any comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, we are required to issue an order in writing granting or denying the petition for waiver, stating the relevant facts and reasons supporting our decision within 90 days after receipt of the original petition. We 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."

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 us, 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 through 1994 annual reports, the utility has provided the necessary information for such determination. Our review of PIC's annual reports verified proper payment of its

regulatory assessment fees. Further, we have found no evidence to suggest that the utility overearned from 1992 through 1994. Therefore, we find that the purpose of Section 367.121, Florida Statutes was achieved when the utility filed its reports.

Section 367.161(1), Florida Statutes, authorizes us 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. The purpose of penalizing utilities for violating Commission rules is to encourage compliance with those rules. Following PIC's filing of its 1992 through 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, we find 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 through 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, we believe that the accrued penalty, or any fraction thereof, would cause a substantial economic hardship to the utility. Such 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, we find it appropriate to grant PIC's petition for waiver, because the utility has demonstrated 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, and the application of the rules would create a substantial hardship for the utility. Accordingly, we find that PIC has satisfied the statutory requirements of Section 120.542, Florida Statutes. Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, this docket shall be closed.

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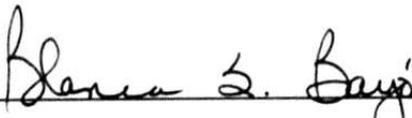
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Pine Island Cove Homeowners Association, Inc.'s Petition for Waiver of Rules 25-30.110(3), (6) and (7), Florida Administrative Code, is hereby granted. It is further

ORDERED that the provisions of this Order are issued as proposed agency action, and shall become final, unless an appropriate petition in the form provided by Rule 25-22.029, Florida Administrative Code, is received by the Director of the Division of Records and Reporting at her office at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the date set forth in the Notice of Further Proceedings below. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 8th day of June, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on June 29, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.