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**DATE:** JUNE 13, 2001

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

**FROM:** DIVISION OF LEGAL SERVICES (BRUBAKER) *JB*  
DIVISION OF ECONOMIC REGULATION (PEACOCK) *made for the ENT*

**RE:** DOCKET NO. 010385-WU - PETITION FOR VARIANCE FROM OR WAIVER OF RULE 25-30.110(3) AND (6), F.A.C., ANNUAL REPORTS, BY GEM ESTATES UTILITIES, INC. IN PASCO COUNTY.

**AGENDA:** 06/25/01 - REGULAR AGENDA - DECISION ON PETITION FOR RULE WAIVER - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** 90-DAY STATUTORY DEADLINE (RULE WAIVER) - 6/27/01

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\010385.RCM

CASE BACKGROUND

Gem Estates Utilities, Inc. (Gem Estates or utility) is a Class C water utility operating in Pasco County. The utility provides water service to 223 mobile home residents and one general service customer. Wastewater service is provided by septic system. According to its 1999 annual report, the utility had gross revenues of \$12,434 with a net operating loss of \$4,488.

Gem Estates was formed in 1974 by Marjorie and Lawrence Cahill. In 1989, their daughters, Ms. Hollis Malberg and Ms. Jacqueline Cahill, became co-trustees of the Marjorie Ruth Cahill Trust, and in 1999, Ms. Malberg assumed responsibility as the sole trustee of the utility.

On March 4, 1999, an application was filed with this Commission seeking approval of the transfer of water facilities from Gem Estates to Gem Estates Mobile Home Village Association.

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Inc. (GEMHVA). The sale of the utility was executed on January 23, 2001, and the transfer was approved by Order No. PSC-01-1241-FOF-WU, issued June 4, 2001, in Docket No. 990256-WU.

In Order No. PSC-01-1241-FOF-WU, the Commission recognized that the utility was current on regulatory assessment fees through 1999. In addition, the utility furnished a statement that it did not collect any revenues for the period January 1 through 23, 2001. Further, according to Commission records, the utility was current on annual reports through 1999. Rule 25-30.110(3), Florida Administrative Code, requires an annual report to be filed for any year a utility is jurisdictional as of December 31 of that year.

GEMHVA is exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes, which exempts nonprofit associations providing service solely to members who own and control it. Therefore, annual reports and regulatory assessment fees (RAFs) will not be assessed on a going-forward basis. However, because the sale of the utility was not executed until January 23, 2001, an annual report and RAFs are required for 2000.

After discussing the matter informally with staff, on March 29, 2001, Ms. Malberg filed a Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code (Petition). Also, on March 23, 2001, the Commission received a 2000 RAF return form and a check in the amount of \$481.97, which according to the information filed with the return is the correct amount owed by the utility for RAFs for 2000.

Pursuant to Section 120.542(6), Florida Statutes, on April 3, 2001, Commission staff provided notice of the requested rule waiver to the Florida Department of State, which published notice of the waiver request in the Florida Administrative Weekly of April 13, 2001. The Commission did not receive any comments regarding the utility's petition. Section 120.542(7), Florida Statutes, requires the Commission to grant or deny a petition for waiver within 90 days of its receipt. The petition was officially filed on March 29, 2001. Therefore, the Commission must grant or deny the petition by June 27, 2001.

This recommendation addresses the utility's petition for rule waiver. The Commission has jurisdiction pursuant to Sections 120.542 and 367.121, Florida Statutes.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant Gem Estates Utilities, Inc.'s petition for rule waiver of Rule 25-30.110(3), Florida Administrative Code?

**RECOMMENDATION:** Yes, the Commission should grant Gem Estates Utilities, Inc.'s petition for rule waiver of Rule 25-30.110(3), Florida Administrative Code, because the petition meets the requirements of Section 120.542, Florida Statutes. (BRUBAKER, PEACOCK)

**STAFF ANALYSIS:** As stated in the case background, Gem Estates was sold on January 23, 2001, to an entity which is exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes. Rule 25-30.110(3), Florida Administrative Code, requires an annual report to be filed for any year a utility is jurisdictional as of December 31 of that year. Similarly, Rule 25-30.120, Florida Administrative Code, requires that RAFs be paid for any year during which a utility is subject to the Commission's jurisdiction as of December 31 of that year. Pursuant to these rules, Gem Estates remains liable for payment of RAFs and the filing of an annual report for the year 2000.

On March 29, 2001, Ms. Malberg filed a Petition for Waiver of Rule 25-30.110(3), Florida Administrative Code (Petition), which requires utilities subject to the Commission's jurisdiction to file an annual report on or before March 31 of the following year. Also, on March 23, 2001, the Commission received a 2000 RAF return form and a check in the amount of \$481.97, which according to the information filed with the return is the correct amount owed by the utility for RAFs for 2000.

Pursuant to Section 120.542(6), Florida Statutes, on April 3, 2001, Commission staff provided notice of the requested rule waiver to the Florida Department of State, which published notice of the waiver request in the Florida Administrative Weekly of April 13, 2001. The Commission did not receive any comments regarding the utility's petition.

Section 120.542(2), Florida Statutes 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 violate principles of fairness. For purposes of the 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 which Rule 25-30.110, Florida Administrative Code, implements are Sections 367.121 and 367.161, Florida Statutes. Section 367.121, Florida Statutes, provides that the Commission shall require regular reports from utilities under its jurisdiction consistent with the uniform system and classification of accounts and may require preparation of the reports by a certified public accountant. Rule 25-30.110(3)(a), Florida Administrative Code implements Section 367.121, Florida Statutes. The purpose of requiring annual reports is to enable the Commission to calculate RAFs, as well as to determine if the utility is in an overearnings position.

Section 367.161, Florida Statutes, provides that the Commission has the power to impose penalties on utilities under its jurisdiction who have refused to comply with or wilfully violate Florida Statutes, Commission rules, or orders. Rule 25-30.110, Florida Administrative Code, which provides for penalties for a utility's failure to timely file its annual report, implements Section 367.161, Florida Statutes. The purpose of requiring payment of penalties for the failure to file or the late filing of annual reports is to promote future compliance with Florida Statutes and Commission rules.

As required by Section 120.542, Florida Statutes, Gem Estates provided a statement explaining why the purpose of the underlying statute would be achieved by the utility's requested rule waiver. Gem Estates alleges that the purposes of the underlying statutes have been achieved. As discussed previously, the utility timely submitted its 2000 RAF return form and a check in the amount of \$481.97, which according to the information filed with the return is the correct amount owed by the utility for RAFs for 2000. The necessity of filing annual reports no longer exists, because the utility is no longer regulated by the Commission. Hence, there is no future compliance which would be promoted through the requirement of filing an annual report or imposition of any associated penalties.

Upon review of the petition, staff believes that Gem Estates has adequately demonstrated that the purposes of the underlying statutes have been achieved. The utility has complied with the rule by providing its 2000 RAF return from which staff can calculate the regulatory assessment fees of this utility and assess the utility's earnings level.

Furthermore, staff believes the utility has demonstrated that the application of the rule will create a substantial hardship to the utility. The petition for rule waiver states that the utility had been operating at a loss for a number of years. According to its 1999 annual report, the utility had gross revenues of \$12,434 with a net operating loss of \$4,488. Ms. Malberg became sole trustee and took over operation of the utility on her sister's behalf in 1999. At this time, the utility was in a state of considerable disrepair and disorganization. Through considerable effort and personal expense, Ms. Malberg brought the utility into compliance with various regulatory standards of the Commission and the Florida Department of Environmental Protection.

Because of the utility's financial difficulties, Ms. Malberg filed for a staff assisted rate case (SARC) on April 20, 2000, which was assigned Docket No. 000467-WU. At approximately this same time, the Gem Estates customers (who ultimately formed GEMHVA) expressed an interest in purchasing and operating the utility. After agreeing upon a price, GEMHVA requested additional time to consult with its members regarding the details of the purchase. Although it was anticipated that the purchase would be completed before December 31, 2000, the survey company hired by GEMHVA did not complete its task when expected. The closing took place on January 23, 2001, at which time Ms. Malberg withdrew her petition for the SARC and Docket No. 000467-WU was closed.

Through circumstances beyond her control, Ms. Malberg was unable to complete the sale of the utility prior to December 31, 2000. She therefore remains liable as trustee for the utility to file Gem Estate's annual report and pay RAFs pursuant to Rules 25-30.110 and 25-30.120, Florida Administrative Code. As discussed previously, Ms. Malberg did in fact timely remit the 2000 RAF return and a check for the RAFS which were due. In order to file the annual report, Ms. Malberg would be required to make the substantial expense of hiring a certified public accountant to assist in the preparation and filing of the 2000 annual report,

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which would include review of documents which are no longer in her possession or control.

Based on the foregoing, staff believes that Gem Estates has met the statutory criteria set forth in Section 120.542, Florida Statutes, and recommends that the Commission grant the utility's petition for waiver of Rule 25-30.110, Florida Administrative Code.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** Yes. This docket should be closed upon issuance of a Consummating Order if no person whose interests are substantially affected by the proposed action files a protest within the 21-day protest period. (BRUBAKER, PEACOCK)

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