

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 010385-WU
ORDER NO. PSC-01-1479-PAA-WU
ISSUED: July 16, 2001

The following Commissioners participated in the disposition of
this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING WAIVER FROM RULE 25-30.110, F.A.C.

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.

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

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from Gem Estates to Gem Estates Mobile Home Village Association, 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, we 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.

GEMHVA is exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes, which exempts a nonprofit association which provides 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. 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.

After discussing the matter informally with our 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, we 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. We did not receive any comments regarding the utility's petition. Section 120.542(7), Florida Statutes, requires that we grant or

deny a petition for waiver within 90 days of its receipt. The petition was officially filed on March 29, 2001. Therefore, we were required to grant or deny the petition by June 27, 2001. This requirement was satisfied by our decision at the June 25, 2001 Agenda Conference. We have jurisdiction pursuant to Sections 120.542 and 367.121, Florida Statutes.

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 we shall require regular reports from utilities under our 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 us to calculate RAFs, as well as to determine if the utility is in an overearnings position.

Section 367.161, Florida Statutes, provides that we have the power to impose penalties on utilities under our 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 this 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, we find 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 we can calculate the RAFs of this utility and assess the utility's earnings level.

Furthermore, we believe the utility has demonstrated that the application of the rule will create a substantial hardship. 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 this Commission and the Florida Department of Environmental Protection.

Because of the utility's financial difficulties, Ms. Malberg filed for a staff assisted rate case 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

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23, 2001, at which time Ms. Malberg withdrew her petition for the staff assisted rate case 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, which would include review of documents which are no longer in her possession or control.

Based on the foregoing, we find that Gem Estates has met the statutory criteria set forth in Section 120.542, Florida Statutes. We therefore grant the utility's petition for waiver of Rule 25-30.110, Florida Administrative Code.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition for Variance from or Waiver of Rule 25-30.110(3) and (6), F.A.C., Annual Reports, by Gem Estates Utilities, Inc. is granted. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that this docket shall 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.

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By ORDER of the Florida Public Service Commission this 16th
day of July, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

JSB

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 that is available under Section 120.57, 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 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. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak

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In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

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.