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COMMISSION
CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: January 6, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Moore, Jaeger) *RMJ* *DTM* *DS*
Division of Economic Regulation (Hewitt, Rendell, Willis) *BA* *W* *JK* *TR*

RE: Docket No. 040246-WS – Proposed adoption of Rule 25-30.457, F.A.C., Limited Alternative Rate Increase, and Rule 25-30.458, F.A.C., Notice of and Public Information for Application for Limited Alternative Rate Increase.

AGENDA: 1/18/05 – Regular Agenda – Rule Adoption – Participation is Limited to Commissioners and Staff

RULE STATUS: Adoption May Be Deferred

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040246#2.RCM.DOC

Case Background

On July 20, 2004, the Commission voted unanimously to propose the adoption of two new water and wastewater utility rules, Rule 25-30.457, Florida Administrative Code, entitled Limited Alternative Rate Increase, and Rule 25-30.458, Florida Administrative Code, entitled Notice of and Public Information for Application for Limited Alternative Rate Increase. A Notice of Rulemaking was issued and published in the Florida Administrative Weekly. No comments or requests for hearing were filed, however, before the rule was filed for adoption, the Joint Administrative Procedures Committee staff attorney advised Commission staff that several changes should be made to Rule 25-30.457. This recommendation addresses those comments and the changes to the rule that staff recommends.

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Discussion of Issues

Issue 1: Should the Commission adopt changes to proposed Rule 25-30.457, Florida Administrative Code, Limited Alternative Rate Increase, to address comments submitted by the Joint Administrative Procedures Committee staff attorney?

Recommendation: Yes. (Moore, Jaeger, Rendell, Willis)

Staff Analysis: Proposed Rule 25-30.457, Florida Administrative Code, provides an alternative to the current staff assisted rate case procedure for small water or wastewater utilities to obtain a limited amount of rate relief more quickly. The rule implements section 367.0814(9), Florida Statutes, which provides that the Commission may by rule establish standards and procedures whereby rates and charges of small utilities may be set using criteria other than those set forth in s. 367.081(1), (2)(a), and (3).

The rule provides that any rate increase will be limited to a maximum of 20 percent and the revenues will be held subject to refund for 15 months after the utility files its annual report for the year the rate adjustment was implemented. Commission staff will not be required to audit the utility's financial or engineering books and records; however, it will follow the current practice of conducting an earnings review of each annual report. The rule requires Commission staff to evaluate the application and determine the petitioner's eligibility for this type of proceeding within 30 days of receipt of a completed application. The official date of filing is 30 days after official acceptance and the rule requires the Commission to act on a recommendation establishing rates no later than 90 days after the official date of filing. It is anticipated that small utilities' use of the procedure provided by Rule 25-30.457 to obtain rates that are closer to compensatory levels will result in less costly regulation.

After the rule was proposed, a staff attorney for the Joint Administrative Procedures Committee (JAPC) submitted comments on the following subsections of the rule. Commission staff worked with the JAPC attorney and the Office of Public Counsel (OPC) to draft changes to the proposed rule to resolve the concerns that were raised. A copy of the rule as proposed by the Commission is attached, with the changes staff recommends shown in type-and-strike format. (Attachment A.)

Subsection (1): JAPC is concerned that this provision could be interpreted to allow a utility that provides both water service and wastewater service and that has water service revenues of \$120,000 and wastewater service revenues of \$180,000 to be eligible for a rate increase under this rule. Section 367.0814(1), Florida Statutes, only authorizes promulgation of rules for a water or wastewater utility whose gross revenues are \$150,000 or less. The rule is not intended to have this meaning, and staff recommends revising it to insure that it cannot be interpreted as JAPC feared.

Subsection (7): This subsection provides that any increase in revenues approved under the rule is limited to a maximum of 20 percent. JAPC's concern is the absence of any criteria for the Commission to use to set an increase of less than 20 percent. Staff explained that the limitation is meant to advise utilities that they may only have a rate application handled under the abbreviated procedures provided by this rule for increases of not more than 20 percent. At the

time it approves the application, the Commission will not have the information necessary to approve a lesser amount than the utility requests. Only if the utility's annual reports subsequently show the utility is overearning will the Commission be able to take action to reduce rates. This response did not satisfy the JAPC attorney's concern, so Commission staff proposed deleting subsection (7) and adding to subsection (1) a provision that a utility may petition for an increase of up to 20 percent. This change resolves JAPC's concern without altering the Commission's authority under the rule.

Subsection (14), renumbered as (13): Staff recommends adding the citation to the specific rule that provides the method for calculating interest when a refund is ordered. This change addresses JAPC's concern that Rule 25-30.457 as proposed does not explicitly provide criteria governing the determination of interest.

Subsection (16), renumbered as (15): JAPC staff objected to the use of the term "may" in referring to the Commission's authority to order a refund with interest to ratepayers if it finds the utility overearned. Staff responded that whether the Commission orders a refund or makes some other disposition of the overearnings requires a case-by-case determination. Staff cited orders where the Commission has disposed of overearnings in ways other than by refund when it found an alternative was in the best interests of the customers,¹ and that the Commission would not want to bind itself to order a refund in all cases when there is no such restriction in the statute. Nevertheless, JAPC staff stated the rule is objectionable as an invalid delegation of legislative authority and that it is vague, lacks adequate standards for decision, and vests unbridled discretion in the Commission.

After some discussion with JAPC and OPC, the concerns of both were addressed by JAPC's suggestion to change the rule to state that any overearnings shall be disposed of as provided in Section 367.081(4)(d), Florida Statutes. Subsection (4)(d) addresses overearnings from price index and pass-through rate increases, but it also provides that "the commission may order the utility to refund, with interest, the difference to the ratepayers and adjust rates accordingly." This change removes the objectionable language without limiting the Commission's authority to dispose of overearnings in some other manner when it finds that it is in the best interests of the customer to do so.

¹ Orders where the Commission netted overearnings with underearnings and did not order a refund: 1) Order No. PSC-01-1246-PAA-WS, issued June 4, 2001, in Docket No. 001382-WS (Pennbrooke Utilities); 2) Order No. PSC-97-1501-FOF-WS, issued November 25, 1997, in Docket No. 961364-WS (Lindrick Service Corp.); and 3) Order No. PSC-96-1205-FOF-WS, issued September 23, 1996, in Docket No. 960011-WS (Indiantown Company, Inc.)

Order where the Commission deferred overearnings for future projects:
Order PSC-00-1165-PAA-WS, issued June 27, 2000, in Docket No. 990243-WS (Sun Communities Finance - wastewater overearnings for a reuse project)

Orders where the Commission ordered the utility to spend overearnings on conservation programs:
1) Order No. PSC-00-1165-PAA-WS, issued June 27, 2000, in Docket No. 990243-WS (Sun Communities Finance - water overearnings); 2) Order No. 23809, issued November 27, 1990, in Docket No. 900338-WS (Sanlando); and 3) Order No. PSC-01-1246-PAA-WS, issued June 4, 2001, in Docket No. 001382-WS (Pennbrooke Utilities.)

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Staff also recommends a technical change to subsection (1), to reduce the number of copies of the application that a utility must file from an original and five to an original and two. Now that the Commission scans and electronically distributes documents that are filed, fewer copies are needed.

Issue 2: Should the rule be filed for adoption with the Secretary of State and the docket be closed?

Recommendation: Yes. After a Notice of Change is published in the Florida Administrative Weekly, the rule should be filed for adoption with the Secretary of State 21 days thereafter and the docket may be closed. (C. Moore)

Staff Analysis: If the Commission approves the changes to Rule 25-30.457, a notice of change must be published. After the notice is published and no petition challenging the rule is filed, or if the rule is adopted without changes, the rule may be filed for adoption with the Secretary of State without further Commission action. The docket may then be closed.

1 | **25-30.457 Limited Alternative Rate Increase.**

2 (1) As an alternative to a staff assisted rate case as described in Rules 25-30.455 and
3 25-30.456, F.A.C., water ~~and wastewater~~ utilities whose total gross annual operating revenues
4 are \$150,000 or less for water service and wastewater utilities whose total gross annual operating
5 revenues are or \$150,000 or less for wastewater service, ~~or \$300,000 or less on a combined basis,~~
6 may petition the Commission for a limited alternative rate increase of up to 20 percent applied to
7 metered or flat recurring rates of all classes of service by submitting a completed application that
8 includes the information required by sections (8) and (9) ~~and (10)~~. In accordance with section
9 367.0814(6), F.S., a utility that requests staff assistance waives its right to protest by agreeing to
10 accept the final rates and charges approved by the Commission unless the final rates and charges
11 would produce less revenue than the existing rates and charges. The original and two ~~five~~ copies
12 of the application shall be filed with the Division of the Commission Clerk and Administrative
13 Services.

14 (2) Upon filing a petition for a limited alternative rate increase, the utility shall mail a
15 copy of the petition to the chief executive officer of the governing body of each municipality and
16 county within the service areas included in the rate request and retain a copy at the utility's
17 business office.

18 (3) Within 30 days of receipt of the completed application, the Division of Economic
19 Regulation shall evaluate the application and determine the petitioner's eligibility for a limited
20 alternative rate increase.

21 (4) Upon reaching a decision to officially accept or deny the application, the Director
22 of the Division of Economic Regulation shall notify the petitioner by letter. If the application is
23 accepted, the Director will initiate limited alternative rate setting. If the application is denied, the
24 letter shall state the reasons for denial.

25 (5) The official date of filing will be 30 days after official acceptance of the

1 application by the Commission.

2 (6) A utility described in section (1) will qualify for limited alternative rate setting if
3 it satisfies the following criteria:

4 (a) The petitioner has filed all annual reports required by Rule 25-30.110(3), F.A.C.;

5 (b) The petitioner has paid applicable regulatory assessment fees as required by Rule
6 25-30.120, F.A.C.;

7 (c) The petitioner has at least 1 year's actual experience in utility operation;

8 (d) The petitioner has complied in a timely manner with all Commission decisions
9 affecting water and wastewater utilities for 2 years prior to the filing of the application under
10 review;

11 (e) The utility has not been granted a staff assisted rate case pursuant to Rule 25-
12 30.455, F.A.C., or a staff assisted alternative rate setting pursuant to Rule 25-30.456, F.A.C.,
13 within the 2-year period prior to the receipt of the application under review;

14 (f) The utility has not been granted a limited alternative rate increase pursuant to this
15 rule within the 3-year period prior to the receipt of the application under review;

16 (g) The utility is currently in compliance with any applicable water management
17 district permit conditions concerning rate structure; and

18 (h) A final order in a rate proceeding that established the utility's rate base, capital
19 structure, annual operating expenses and revenues has been issued for the utility within the 7-
20 year period prior to the receipt of the application under review.

21 ~~(7) Any increase in operating revenues approved pursuant to this rule shall be limited~~
22 ~~to a maximum of 20 percent applied to metered or flat recurring rates of all classes of service.~~

23 ~~(8)~~ The Commission shall deny the application if a petitioner does not remit the fee,
24 as provided by section 367.145, F.S., and Rule 25-30.020(2)(f), F.A.C., within 30 days after
25 official acceptance of the application.

1 (8)(9) Each petitioner for limited alternative rate increase shall provide the following
2 general information to the Commission:

3 (a) The name of the utility as it appears on the utility's certificate and the address of
4 the utility's principal place of business; and

5 (b) The type of business organization under which the utility's operations are
6 conducted: If the petitioner is a corporation, the date of incorporation and the names and
7 addresses of all persons who own 5 percent or more of the petitioner's stock; if the petitioner is
8 not a corporation, the names and addresses of the owners of the business.

9 (9)(10) The petitioner shall provide a schedule showing:

10 (a) Annualized revenues by customer class and meter size for the most recent 12-
11 month period using the rates in effect at the time the utility files its application.

12 (b) Current and proposed rates for all classes of customers.

13 (10)(11) The petitioner shall provide a statement that the figures and calculations
14 upon which the change in rates is based are accurate and that the change will not cause the utility
15 to exceed its last authorized rate of return on equity.

16 (11)(12) A financial or engineering audit of the utility's financial or engineering
17 books and records shall not be required in conjunction with the application under review.

18 (12)(13) The application will be approved, denied, or approved with modifications
19 within 90 days from the official filing date as established in subsection (5) above.

20 (13)(14) In consideration of subsections (11) and (12) and ~~(13)~~, the utility agrees to
21 hold any revenue increase granted under the provisions of this rule subject to refund with interest
22 in accordance with Rule 25-30.360, F.A.C., for a period of 15 months after the filing of the
23 utility's annual report required by section 367.121, F.S., for the year the adjustment in rates was
24 implemented.

25 (14)(15) To insure overearnings will not occur due to the implementation of this

1 rate increase, the Commission will conduct an earnings review of the utility's annual report to
2 determine any potential overearnings for the year the adjustment in rates was implemented.

3 ~~(15)(16)~~ If, within 15 months after the filing of a utility's annual report required by
4 section 367.121, F.S., the Commission finds that the utility exceeded the range of its last
5 authorized rate of return on equity after an adjustment in rates, as authorized by this rule, was
6 implemented within the year for which the report was filed, such overearnings ~~the Commission~~
7 ~~may order the utility to refund, up to the amount held subject to refund, with interest, shall be~~
8 disposed of for the benefit of the customers as provided in Section 367.081(4)(d), Florida
9 Statutes the difference to the ratepayers and adjust rates accordingly.

10 ~~(16)(17)~~ In the event of a protest of the proposed agency action (PAA) order pursuant to
11 Rule 28-106.201, F.A.C., by a substantially affected person other than the utility, unless the PAA
12 Order proposes a rate reduction, the utility may implement the rates established in the PAA
13 Order on a temporary basis upon the utility filing a staff assisted rate case application pursuant to
14 Rule 25-30.455, F.A.C., within 21 days of the date the protest is filed.

15 ~~(17)(18)~~ In the event of a protest, the limit on the maximum increase provided in ~~(1)(7)~~
16 above shall no longer apply.

17 ~~(18)(19)~~ If the utility fails to file a staff assisted rate case application within 21 days in
18 the event there is a protest, the application for a limited alternative rate increase will be deemed
19 withdrawn.

20 Specific Authority: 350.127(2), 367.0814, 367.121(1)(a), F.S.

21 Law Implemented: 350.123, 367.0814, 367.121, 367.145(2), F.S.

22 History: New XX/XX/XX.
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