

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: August 20, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Engineering (Watts, Doehling, Ramos) *TB*
Division of Accounting and Finance (Blocker, Norris) *ALM*
Office of the General Counsel (Schrader) *JSC*

RE: Docket No. 20200155-WU – Application for certificate to operate water utility in Okaloosa County by Okaloosa Waterworks, Inc.

AGENDA: 09/01/20 – Regular Agenda – Rule Waiver; Proposed Agency Action - Interested Persons May Participate

COMMISSIONERS ASSIGNED:

PREHEARING OFFICER: Brown

CRITICAL DATES: 10/12/2020 (90-Day Rule Waiver Statutory Deadline)

SPECIAL INSTRUCTIONS: None

Case Background

On June 10, 2020, Okaloosa Waterworks, Inc. (Okaloosa) filed a Petition for Variance or Waiver of Rule 25-30.120, Florida Administrative Code (F.A.C.) (Waiver Petition). Rule 25-30.120, F.A.C., states, in part, that a utility is obligated to remit regulatory assessment fees (RAFs) for any year in which it is subject to the Florida Public Service Commission's (Commission) jurisdiction on or before December 31 of that year. The waiver is sought in connection with Okaloosa's application for an original water certificate¹ and a pass through increase of regulatory assessment fees (Certificate and Pass Through Application) also filed in this docket.

The utility was previously owned by the Blackman Community Water System (Blackman), a not-for-profit corporation providing service solely to its members, originally formed in

¹ Okaloosa is an existing utility currently charging for service.

December 2004.² U.S. Water Services Corporation (U.S. Water) acquired the utility via public auction on February 12, 2020. U.S. Water subsequently transferred ownership of the utility to Okaloosa, which was incorporated under the laws of Florida on February 13, 2020.

Okaloosa provides water service to approximately 228 residential customers consisting of single-family residential homes and 9 general service customers in northern Okaloosa County, near Baker, Florida. All of the customers are water only, and have 5/8" x 3/4" meters. According to Okaloosa, Blackman's Board of Directors established the utility's current rates and charges on August 8, 2016. Okaloosa states that it has been charging these same rates and charges as Blackman since its acquisition of the utility.

Pursuant to Section 120.542(5), Florida Statutes (F.S.), staff published notice of Okaloosa's Waiver Petition in the Florida Administrative Register on June 15, 2020. In accordance with Rule 28-104.003(1), F.A.C., interested persons have 14 days after the publication of the notice to submit written comments. The Commission has not received any written comments pertaining to the Waiver Petition, and the time for such comments has expired.

On July 9, 2020, after an initial review of the Waiver Petition, staff sent Okaloosa a request for additional information related to its request for rule variance or waiver, pursuant to Section 120.54(7), F.S. Okaloosa responded with this additional information on July 13, 2020.³

This recommendation addresses Okaloosa's Waiver Petition. Issues relating to Okaloosa's Certificate and Pass Through Application will be addressed in a subsequent staff recommendation. The Commission has jurisdiction over this matter pursuant to Sections 367.071 and 120.542, F.S.

² Pursuant to Section 367.022(7), F.S., nonprofit corporations, associations, or cooperatives providing service solely to members who own and control such nonprofit corporations, associations, or cooperatives are exempt from Commission regulation.

³ Document No. 03739-2020.

Discussion of Issues

Issue 1: Should the Commission approve Okaloosa’s request for waiver or variance of Rule 25-30.120, F.A.C.?

Recommendation: Yes, Okaloosa has demonstrated that the purpose of the underlying statutes of Rule 25-30.120, F.A.C., will be, or has been, achieved by other means, and that the strict application of the rule would place a substantial hardship on Okaloosa. Therefore, staff recommends that the Commission approve Okaloosa’s Waiver Petition, and temporarily waive the requirements of Rule 25-30.120, F.A.C., until such time as 1) the Commission establishes approved rates for Okaloosa and Commission staff administratively approves a pass through of RAFs pursuant to Section 367.081(4)(b), F.S., or 2) within three months of the Commission’s vote regarding Okaloosa’s Waiver Petition, whichever occurs first. (Schrader)

Staff Analysis: As stated above, Okaloosa filed a Waiver Petition seeking a waiver or variance of a requirement of Rule 25-30.120, F.A.C. The rule requires that a utility pay RAFs for a given year if the utility is subject to the Commission’s jurisdiction as of December 31 of that year or is subject to such jurisdiction during any part of that year. Okaloosa’s Waiver Petition seeks a temporary waiver or the variance of this RAF payment obligation until such time as Okaloosa is authorized to increase its rates pursuant to Section 367.081(4)(b), F.S. That section allows water and wastewater utilities to automatically revise rates, with verified notice to the Commission 45 days prior to implementing such revision, when the utility is subject to changes to certain specified costs—including RAFs. The effect of approving this Waiver Petition would be to permanently waive any RAFs that would have been otherwise due from Okaloosa to the Commission for the months it has owned and operated the utility, until the date Okaloosa’s Certificate and Pass Through Application is approved.

Section 120.542(2), F.S., authorizes the Commission to grant waivers or variances from its rules when the petitioner subject to the rule has demonstrated that 1) the purpose of the underlying statute will be or has been achieved by other means, and 2) a strict application of the rule would cause the applicant substantial hardship or would violate principles of fairness. “Substantial hardship,” as defined in Section 120.542, F.S., means that the petitioner has demonstrated economic, technological, legal, or other hardship. A violation of “principles of fairness” occurs when the an agency’s literal application of a rule would affect a particular person in a manner significantly different from the way it would affect other persons who are similarly situated and subject to that rule.

As stated in Okaloosa’s Waiver Petition, Blackman was founded as an exempt cooperative and was not subject to the Commission’s jurisdiction until being acquired by U.S. Water and subsequently transferred to Okaloosa. Thus, the cost of RAFs was not accounted for in Blackman’s rates.

The particular provision of Rule 25-30.120, F.A.C., for which Okaloosa is seeking a waiver or variance from is the obligation, under subsection (2), that requires all utilities under the Commission’s jurisdiction during a particular calendar year pay to RAFs for that year. The

underlying statutory provisions pertaining to the payment of RAFs and Rule 25-30.120, F.A.C., are Sections 367.145 and 350.113, F.S. Of note, Subsections 367.145(1) and (3), F.S., state that:

(1) The commission shall set by rule a regulatory assessment fee that each utility must pay in accordance with s. 350.113(3);

....

(3) Fees collected by the commission pursuant to this section may only be used to cover the cost of regulating water and wastewater systems. Fees collected by the commission pursuant to chapters 364 and 366 may not be used to pay the cost of regulating water and wastewater systems.

Section 350.113, F.S., specifies the purposes and management of the Commission's Florida Public Service Regulatory Trust Fund, which is where RAFs are deposited. Of specific relevance here, 350.113(3), F.S., states, in part, that RAFs "to the extent practicable, be related to the cost of regulating" each type of regulated utility.

Sections 367.145 and 350.113, F.S., convey that the purpose of assessing RAFs is to fund the cost of the Commission's regulation of utilities. Central to Okaloosa's argument is that RAFs are not included in its current rates due to those rates being established by Blackman's Board in 2016, which is prior to the utility becoming subject to the Commission's jurisdiction in February 2020. Regulated utilities can request that the cost of RAFs be included in their rates utilizing the pass through provisions in Section 367.081(4)(b), F.S. The Commission has previously stated that pass through items cannot be approved without the utility first having "approved rates" established by the Commission.⁴ Therefore, as Okaloosa notes, a pass through of RAFs is not permissible until such time as it receives its water certificate and the Commission establishes approved rates for Okaloosa. For that reason, Okaloosa argues it is placed at an unfair financial disadvantage due to its inability to collect RAFs in its current rates.

Okaloosa contends that the Commission has incurred minimal to no costs of regulating the utility under Chapter 367, F.S., absent the review of Okaloosa's Certificate and Pass Through Application in this docket. Okaloosa also notes that it has paid the applicable filing fee of \$1,500 as required by Section 367.145(2), F.S., and Rule 25-30.020, F.A.C., for the processing of its filing. Additionally, as Okaloosa points out in its July 13, 2020 response to staff,⁵ the Commission has previously granted a waiver of RAFs for water utilities in similar situations.⁶

⁴ Order No. PSC-2018-0075-PAA-WU, issued February 12, 2018, in Docket No. 20170155-WU, In re: Application for grandfather water certificate in Leon County and application for pass through increase of regulatory assessment fees, by Seminole Waterworks, Inc.; and PSC-2018-0441-PAA-WU, issued August 29, 2018, in Docket No. 20170253-WU, In re: Application for grandfather water certificate in Leon County by Lake Talquin Water Company, Inc.

⁵ Document No. 03739-2020.

⁶ Order No. PSC-2018-0075-PAA-WU, issued February 12, 2018, in Docket No. 20170155-WU, In re: Application for grandfather water certificate in Leon County and application for pass through increase of regulatory assessment fees, by Seminole Waterworks, Inc.; and PSC-2018-0441-PAA-WU, issued August 29, 2018, in Docket No. 20170253-WU, In re: Application for grandfather water certificate in Leon County by Lake Talquin Water Company, Inc.

Based on the foregoing analysis and the information provided within Okaloosa's Waiver Petition, staff believes that Okaloosa has met the requirements of Section 120.542, F.S., in regard to temporarily waiving the requirements of Rule 25-30.120, F.A.C. Okaloosa has demonstrated that the purpose of the of the statutes underlying Rule 25-30.120, F.A.C. will be, or has been, achieved by other means, because minimal Commission regulation of the utility has been required to this point. Further, staff believes the strict application of Rule 25-30.120, F.A.C., would place a substantial hardship on Okaloosa by requiring it to pay regulatory expenses for which it is not currently compensated through rates. Therefore, staff recommends that the Commission approve Okaloosa's Waiver Petition, and temporarily waive the requirements of Rule 25-30.120, F.A.C., until such time as 1) the Commission establishes approved rates for Okaloosa and Commission staff administratively approves a pass through of RAFs pursuant to Section 367.081(4)(b), F.S., or 2) within three months of the Commission's vote regarding Okaloosa's Waiver Petition, whichever occurs first.

Issue 2: Should this docket be closed?

Recommendation: This docket should remain open pending the Commission's final decision regarding Okaloosa's Certificate and Pass Through Application. If no person whose substantial interests are affected by the proposed agency action for the rule waiver files a protest within 21 days of the issuance of the order, a consummating order should be issued. (Schrader)

Staff Analysis: This docket should remain open pending the Commission's final decision regarding Okaloosa's Certificate and Pass Through Application. If no person whose substantial interests are affected by the proposed agency action for the rule waiver files a protest within 21 days of the issuance of the order, a consummating order should be issued.