

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: October 24, 2024

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Economics (Bethea, Bruce) *EJD*
Division of Engineering (Watts) *TB*
Office of the General Counsel (Dose, Crawford) *JSC*

RE: Docket No. 20240106-WU – Application for a revenue-neutral uniform water rate restructuring limited proceeding in Alachua, Duval, Leon, Okaloosa, and Washington Counties, by North Florida Community Water Systems, Inc.

AGENDA: 11/05/24 – Regular Agenda – Proposed Agency Action - Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: 90-day statutory deadline waived until 11/05/24

SPECIAL INSTRUCTIONS: None

Case Background

On July 25, 2024, North Florida Community Water Systems, Inc. (NFCWS) filed an application for a revenue-neutral uniform water rate restructuring limited proceeding for the six water utilities it owns in Alachua, Duval, Leon, Okaloosa, and Washington Counties. NFCWS is seeking a rule waiver to use the limited proceeding rule, Rule 25-30.445, Florida Administrative Code (F.A.C.), to consolidate these systems for ratemaking purposes.

The six water systems at issue here are Duval Water System (Duval); Gator Water System (Gator); Lake Talquin Water System (Lake Talquin); Okaloosa Water System (Okaloosa); Seminole Water System; and Sunny Hills Water System (Sunny Hills). Of these systems, Duval and Sunny Hills have wastewater systems. By Order No. PSC-2023-0097-FOF-WS, the

Commission acknowledged the corporate reorganization and name change of these systems to NFCWS.¹ The corporate reorganization resulted in no change in the ownership or control of the utilities, and each NFCWS system continues to charge its own respective Commission-approved rates and charges.

In its July 23, 2024, petition for limited proceeding, NFCWS seeks uniform rates for these systems. NFCWS states that the various rates charged by each system are widely disparate. Uniform rates, if granted, would result in a reduction in typical residential bills, except for the Gator and Okaloosa water systems which would see a minimal increase in rates. NFCWS states that the requested rates will provide significant relief to approximately seventy-four percent of the residential customers and that for Okaloosa, customers will benefit by a less stringent and more meaningful, understandable rate structure. NFCWS also states that conservation-oriented rates will be implemented for Lake Talquin.

On September 13, 2024, the Office of Public Counsel (OPC) filed a letter providing concerns regarding NFCWS's petition for partial variance or waiver of the requirements of Rule 25-30.445, F.A.C. In its letter, OPC stated that NFCWS does not appear to qualify for a waiver or for a limited proceeding in the instant docket. OPC requests that the Commission deny NFCWS's request for partial variance or waiver of Rule 25-30.445, F.A.C. NFCWS responded to OPC's letter on September 16, 2024, to which OPC filed a second letter still in opposition on October 11, 2024.²

The Commission has broad authority to conduct limited proceedings under Section 367.0822(1), Florida Statutes (F.S.). Rule 25-30.445, F.A.C., which the Commission adopted to implement Section 367.0822, F.S., restricts the ability of water and wastewater systems to use the limited proceeding process. Rule 25-30.445(6), F.A.C., provides that a limited proceeding will not be allowed if:

- (a) The utility's filing includes more than six separate projects for which recovery is sought. Corresponding adjustments for a given project are not subject to the above limitation;
- (b) The requested rate increase exceeds 30 percent;
- (c) The utility has not had a rate case within seven years of the date the petition for limited proceeding is filed with the Commission; or
- (d) The limited proceeding is filed as the result of the complete elimination of either the water or wastewater treatment process.

NFCWS argues that Rule 25-30.445, F.A.C., seems to contemplate a petition for limited proceeding that is predicated upon a rate increase. However, NFCWS is requesting a revenue-

¹ Issued February 22, 2023, in Docket No. 20220199-WS, *In re: Joint application for acknowledgement of corporate reorganization and approval of name changes on Certificate Nos. 641-W and 551-S in Duval County, Certificate No. 555-W in Alachua County, Certificate Nos. 678-W and 672-W in Leon County, Certificate No. 676-W in Okaloosa County, and Certificate Nos. 501-W and 435-S in Washington County from Duval Waterworks, Inc., Gator Waterworks, Inc., Lake Talquin Waterworks, Inc., Seminole Waterworks, Inc., Okaloosa Waterworks, Inc., and Sunny Hills Utility Company to North Florida Community Water Services, Inc.*

² Respectively, DN 08999-2024, 09023-2024, and 09481-2024.

neutral rate restructuring based upon existing historical revenues, not a revenue increase. Further, NFCWS recognizes that not all of its systems meet the seven-year rate case requirement of Rule 25-30.445(6)(c), F.A.C. Consequently, on August 2, 2024, NFCWS filed a request for a partial variance from, or waiver of, the requirements of the rule governing limited proceedings.

Florida law allows agencies to waive or provide other relief (variances) to persons subject to regulation where the strict application of uniformly applicable rule requirements leads to “unreasonable, unfair, and unintended results in particular instances.” Section 120.542(1), F.S. 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 when application of a rule would create a substantial hardship or would violate principles of fairness. Section 120.542(2), F.S.

On August 12, 2024, the Commission filed a Florida Administrative Register notice acknowledging receipt of NFCWS’s rule waiver petition. The time for filing comments, provided by Rule 28-104.003, F.A.C., expired on August 27, 2024; no customer comments as to NFCWS’s rule waiver petition were received. On September 11, 2024, NFCWS waived the 90-day deadline for the Commission to grant or deny its petition, pursuant to Section 120.542(8), F.S., through the November 5, 2024, Commission Agenda Conference.

This recommendation addresses NFCWS’s petition for rule waiver only. If the Commission approves NFCWS’s request for rule waiver, a subsequent recommendation addressing the merits of NFCWS’s application for a rate restructuring will be presented at a subsequent Agenda Conference. The Commission has jurisdiction under Sections 120.542, 367.0822, and 367.121, F.S.

Discussion of Issues

Issue 1: Should the Commission grant NFCWS’s petition for a waiver of Rule 25-30.445(6), F.A.C.?

Recommendation: Yes. NFCWS has demonstrated that the purpose of the underlying statute is being achieved and that strict application of the rule violates principles of fairness to its customers. (Dose)

Staff Analysis:

NFCWS’s Position

In its July 23, 2024, petition for limited proceeding, NFCWS states that the various rates reflect a wide disparity among its systems. NFCWS believes that implementation of uniform rates will result in a more equitable disbursement of operating costs among the water customer group and that it would be more efficient to have a uniform water rate structure for all of its water systems. NFCWS states that it is not seeking an increase in revenues or recovery of capital items or operating expenses in this docket. In support of its position, NFCWS cited Order No. PSC-2010-0219-PAA-WS, where the Commission found that “a revenue-neutral rate restructuring for a Class B utility is tantamount to a limited proceeding rate case with no revenue increase.”

NFCWS states that the revenue neutral water rate restructuring represents a significant reduction in rates and water bills to approximately seventy-four percent of the water residential customers. NFCWS acknowledges that four of the six water systems have not had a rate case in the past seven years as required by the rule. However, NFCWS states that if it were required to obtain outside legal counsel and file six sets of Minimum Filing Requirements (MFRs), any reduction in rates would be diminished due to the additional costs involved.

NFCWS contends that the purpose of the statute is to afford the Commission broad discretion as to matters that are appropriate for a limited proceeding in order to alleviate the time and expense of full rate proceedings. As to the requirement that a utility can avail itself to a limited proceeding only if it has had a rate case within the last seven years, NFCWS states that although there is “nothing magic” about seven years, it was intended to assure that when a limited proceeding rate increase was considered, the utility’s overall financial information had been vetted in recent years by the Commission. NFCWS argues that when the limited proceeding does not seek a revenue increase (other than for rate case expense), that vetting is not necessary. Further, NFCWS believes the underlying purpose of the statute would be achieved if a waiver or variance is granted because the Commission would retain its right to obtain information required to achieve the appropriate rate consolidation, including conducting an audit, if necessary.

OPC’s Position

In its September 13, 2024, letter of concerns regarding NFCWS’s petition for partial variance or waiver of Rule 25-30.445, F.A.C., OPC raises several objections to NFCWS’s positions. First, OPC distinguishes the instant case from that cited by NFCWS to support a limited proceeding in this case. OPC notes that Order No. PSC-2010-0219-PAA-WS concerned the revenue-neutral

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rate restructuring of a utility operating one water system and one wastewater system in a single county, whereas NFCWS is proposing consolidated rates for six water systems across five counties.

Second, OPC states that, within the last seven years, the Commission has only established base rates and cost of service in rate proceedings for Gator and Sunny Hills. OPC believes that only these two are eligible for a limited proceeding and that the other four water systems must come in for a rate proceeding. OPC disagrees with NFCWS's position that overall financial information vetting is not necessary in this case and would like the Commission to review the revenue requirements of all six water systems. OPC fears that without this, inaccurate subsidy levels and unsupported rate increases will result in future proceedings.

Lastly, OPC states that NFCWS's assertion of substantial hardship and additional costs of going through multiple rate proceedings may be without merit. OPC asserts that the rate case expense for a limited proceeding versus a rate case are virtually the same and include costs for customer notices, travel for customer meeting and agenda, and filing fee, excluding any legal fees. OPC asserts that other additional costs are already embedded through affiliate contractual services, such as contractual services provided by U.S. Water Services Corporation which would prepare the MFRs for the utilities whether they are one consolidated set of MFRs or six separate sets of MFRs.

In response to OPC's position, NFCWS responded by letter dated September 16, 2024, stating that in a similar request for waiver of the rule from NFCWS's sister affiliated utility, Florida Community Water Systems, OPC was an interested party but raised no objection despite very similar circumstances to the present request. OPC responded by letter dated October 11, 2024, countering that its decision to not raise an objection in a factually distinct docket should not bar the Commission's consideration of an objection in the instant docket.

Requirements of Section 120.542, F.S.

Section 120.542(2), F.S., provides a two-pronged test for determining when waivers of and variances from agency rules 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 when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Purpose of the Underlying Statute

Rule 25-30.445, F.A.C., primarily implements Section 367.0822, F.S.,³ which authorizes the Commission to “conduct limited proceedings to consider, and act upon, any matter within its jurisdiction” Rule 25-30.445(6), F.A.C., serves to limit the matters that the Commission may take up via a limited proceeding. The Commission has previously opined as to the underlying purpose of Section 367.0822, F.S.:

We believe that the purpose of the Legislature in enacting Section 367.0822, Florida Statutes (1985), was to provide a narrow exception to Section 367.081, Florida Statutes (1985), which requires the Commission to consider a broad range of ratemaking components. The purpose of a limited proceeding is to permit review of generally singular topics, or a few well-defined issues, to the exclusion of all others. The limited applicability of such a proceeding mandates that the burden must rest on the utility to prove that Section 367.0822, Florida Statutes (1985)[,] should, in fact, be utilized with regard to a specific case.⁴

While the Commission has approved prior rate consolidations in the context of full rate case proceedings,⁵ there is no statutory requirement that rate consolidations must be conducted under Section 367.081, F.S., versus a Section 367.0822, F.S., proceeding. Further, the Commission has allowed revenue-neutral rate restructuring through a limited proceeding on prior occasions.⁶

The limitations set out under Rule 25-30.445, F.A.C., are unique to the water and wastewater industry. Section 366.076, F.S., provides for petitions for limited proceedings by electric and gas companies, and its associated Rule 25-6.0431, F.A.C., does not contain the same limiting provisions as Rule 25-30.455, F.A.C. The purpose of Section 367.0822, F.S. – to allow the Commission to review the singular issue of a revenue-neutral consolidation of the NFCWS systems’ rates – is met if Rule 25-30.445(6), F.A.C., is waived. As acknowledged by NFCWS, the Commission would retain its authority to solicit any information needed to process the requested rate consolidation, including conducting an audit if necessary, as well as continue regulatory oversight and earnings’ surveillance through NFCWS’s annual reports. Staff therefore recommends that NFCWS has demonstrated that the purpose of the underlying statute would be achieved if the requirements of Rule 25-30.445(6), F.A.C., are waived.

³ Rule 25-30.445, F.A.C., also implements Sections 367.081, 367.0812, 367.121(1)(a), and 367.145(2), F.S.

⁴ Order No. 16670, issued October 2, 1986, in Docket No. 861056-SU, *In re: Petition of Betmar Utilities for Limited Proceeding for Adjustment in Sewer Rate Base in Pasco County* and PSC-2010-0219-PAA-WS.

⁵ See, e.g., Order No. PSC-2017-0361-FOF-WS, issued September 25, 2017, in Docket No. 20160101-WS, *In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida*.

⁶ Order Nos. PSC-2023-0300-PAA-WS, issued October 2, 2023, in Docket No. 20220201-WS, *In re: Request by Florida Community Water Systems, Inc. for a revenue-neutral rate restructuring in Brevard, Lake, and Sumter Counties*, PSC-95-0967-FOF-SU, issued August 8, 1995, in Docket No. 19941270-SU, *In re: Application for revenue neutral wastewater rate restructuring in Lee county by Forest Utilities, Inc.* and PSC-10-0219-PAA-WS, issued April 6, 2010, in Docket No. 20080295-WS, *In re: Request by Sun Communities Finance, LLC d/b/a Water Oak Utility for a revenue-neutral rate restructuring to implement conservation rates in Lake County*.

Substantial Hardship or Principles of Fairness

The second prong of the rule waiver test is met if strict application of the rule either (1) creates a substantial hardship or (2) would violate the principles of fundamental fairness. The utility may meet the second prong through either path and is not required to show both.

In its petition, NFCWS argues that denying the rule waiver would result in an economic hardship as it would require NFCWS to file for a full rate case in order to achieve consolidation of its systems' rates. A full rate case would involve compiling and filing six separate sets of MFRs and retaining outside legal counsel, the costs of which would reduce or obviate any customer savings as a result of the rate restructuring. While the costs of a full rate proceeding may be substantial, staff is not persuaded that such costs per se constitute an "economic hardship" to the utility sufficient to support waiver of the rule. While customers might pay substantially more for rate consolidation effected under a Section 367.081, F.S., rate proceeding, subsection 367.081(7), F.S., permits the utility to recover its reasonable rate case expense through rates paid by its customers.

However, the second prong of the rule waiver statute may also be met when application of the rule would violate principles of fairness. "Principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Section 120.542(2), F.S.

Allowing NFCWS to pursue a revenue-neutral rate restructuring and consolidate its systems' rates through a limited proceeding is expected to allow the majority of NFCWS's customers to benefit from lower and more simplified rates at a minimal increase to customers in Gator and Okaloosa. Requiring NFCWS to pursue these goals through a full base rate proceeding would unfairly minimize or obviate the benefits of consolidation by adding the additional time and rate case expense required to process an application pursuant to Section 367.081, F.S.

Staff recommends that a limited proceeding will allow the Commission to maintain appropriate regulatory oversight of the proposed rate consolidation to the benefit of the utility and its customers. The potential benefits to the utility and its customers stand to be lost if NFCWS is not permitted to pursue the proposed revenue-neutral rate restructuring as a limited proceeding. Therefore, staff recommends that strict application of the rule would violate the principles of fairness.

Conclusion

Section 120.542(1), F.S., acknowledges that strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Commission must waive a rule if the utility can show both that the purpose of the underlying statute is achieved by other means and that the principles of fairness are violated if the rule is strictly applied. This case presents a situation wherein the strict application of the rule affects NFCWS differently than it would another utility because strict application of the rule would obviate the benefits of consolidation, and the petition meets both prongs of the test. Therefore, staff recommends the Commission grant the petition for waiver of Rule 25-30.445(6), F.A.C.

Issue 2: Should this docket be closed?

Recommendation: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued. If the utility's petition for a rule waiver is granted, then the docket should remain open pending the Commission's decision regarding NFCWS's petition for a limited proceeding. However, if the utility's petition for a rule waiver is denied, then the docket should be closed upon the issuance of the consummating order. (Dose, Crawford)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued. If the utility's petition for a rule waiver is granted, then the docket should remain open pending the Commission's decision regarding NFCWS's petition for a limited proceeding. However, if the utility's petition for a rule waiver is denied, then the docket should be closed upon the issuance of the consummating order.