

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: January 6, 2004

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

FROM: Office of the General Counsel (Moore, Jaeger)
Division of Economic Regulation (Hewitt, Rendell, Willis)

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.

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.)

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.