

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: November 8, 2006

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

FROM: Division of Economic Regulation (Brady, Redemann)
Office of the General Counsel (Jaeger)

RE: Docket No. 060601-WS – Application for certificates to provide water and wastewater service in Okeechobee County by Grove Utilities, Inc.

AGENDA: 11/21/06 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Deason

CRITICAL DATES: 12/11/06 (90-Day Rule Waiver Statutory Deadline)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060601.RCM.DOC

Case Background

On September 11, 2006, Grove Utilities, Inc. (applicant or utility) submitted an application for original water and wastewater certificates in Okeechobee County, Florida, along with a Motion for Temporary Rule Waiver of Rule 25-30.033(1)(h), (j), (k), (m), (r), (t), (u), (v) and (w), Florida Administrative Code (F.A.C.). The utility's proposed service territory comprises approximately nine square miles (5,700 acres) in the northeastern corner of Okeechobee County which is currently being used for agricultural (citrus) activities. This area is located in the South Florida Water Management District which is considered a critical water supply problem area.

The Grove Community Development Corporation (affiliated developer), intends to develop a self-contained community in the service area with an estimated 15,000 residential units and over three million square feet of commercial development with a build-out over the next 18 years. The affiliated developer has submitted a Request for Service to the applicant, and the applicant plans to begin serving customers on or about July 1, 2010.

Pursuant to Section 120.542, Florida Statutes (F.S.), notice of the petition for waiver was published in the Florida Administrative Weekly on September 29, 2006, and amended and republished on October 6, 2006. No written comments to either publication were received and the time for filing such has expired.

This recommendation addresses the Motion for Temporary Rule Waiver of Rule 25-30.033(1)(h), (j), (k), (m), (r), (t), (u), (v) and (w), F.A.C. The issues of the granting of certificates and the setting of appropriate rates and charges will be addressed at a later date. The Commission has jurisdiction pursuant to Sections 367.031 and 367.045, F.S.

Discussion of Issues

Issue 1: Should the Commission grant Grove Utilities, Inc.'s Motion for Temporary Rule Waiver of Rule 25-30.033(1)(h), (1)(j), (1)(k), (1)(m), (1)(r), (1)(t), (1)(u), (1)(v), and (1)(w), Florida Administrative Code?

Recommendation: Yes, the Commission should grant Grove Utilities, Inc.'s Motion for Temporary Rule Waiver. (Jaeger, Brady, Redemann)

Staff Analysis: Rule 25-30.033(1)(h), (j), (k), (m), (r), (t), (u), (v), and (w), F.A.C., directs the applicant for an original certificate to file information necessary for the granting of certificates and for setting initial rates and charges, including: number and type of equivalent residential connections (ERCs); evidence that the utility owns the land or has continued use of the land upon which the utility facilities are or will be located; the filing of the original and two copies of tariffs; the filing of a detailed system map showing the proposed lines, treatment facilities, and the territory to be served; a detailed financial statement¹; a cost study supporting proposed rates and charges; a schedule showing the projected costs of the systems; a schedule showing projected operating expenses; and a schedule showing the projected capital structure. The applicant has asked for a temporary waiver of these parts of the rule so that it may receive its certificates and then proceed with water use permitting and wastewater treatment plant permitting. When the applicant has received its permits it will be able to provide more accurate cost estimates, schedules, and cost studies to support initial rates and charges.

Section 120.542, F.S., authorizes the Commission to grant variances or waivers to the requirements of its rules where the person subject to the rules has demonstrated that the underlying purpose of the statute has been or will be achieved by other means, and strict application of the rules would cause the person substantial hardship or would violate principles of fairness. "Substantial hardship" as defined in this section means demonstrated economic, technological, legal, or other hardship.

The underlying statutory provisions pertaining to the above-mentioned rules are Sections 367.031 and 367.045, F.S. Section 367.031, F.S., requires each utility seeking to provide water and wastewater service to obtain a certificate of authorization from the Commission prior to obtaining permits from the Department of Environmental Protection (DEP) and water management districts. Paragraph 367.045(5)(a), F.S., states that the Commission may grant a certificate of authorization if it is in the public interest. The purpose of Sections 367.031 and 367.045, F.S., is to ensure that a utility has the financial and technical ability to provide service, that there is a need for service in the proposed service area, and to determine the existence or nonexistence of service from other sources within geographical proximity to the proposed service area. Waiver of the parts of the rule that require information to be filed that is needed to set rates will not prevent the Commission from determining whether the utility is financially or technically able to provide service, whether the service is needed, or whether service can be provided from other sources when the application for original certificate is before the

¹ Information concerning the applicant's financial ability to provide service was provided pursuant to Rule 25-30.033(1)(e), Florida Administrative Code, and the detailed financial statement required by Rule 25-30.033(1)(r), Florida Administrative Code, is not required to determine financial ability.

Commission. Rates can be set at a later date, and often are.² Therefore, granting a temporary waiver for the filing of rates and charges information will not affect the underlying purpose of the rule.

The development planned for the territory to be served by the applicant will need water and wastewater service starting in July 2010. The applicant states that although it does not expect to provide service for over three years from now, Section 367.031, F.S., requires that a utility obtain a certificate from the Commission before DEP and the Water Management District may issue construction and operating permits. As such, the applicant cannot procure the water use permit and wastewater treatment plant construction permits until it procures a Commission certificate. It is during these permitting processes that the utility refines the size, location, and associated costs for its treatment facilities. The hardship created by this circumstance is the applicant's inability to determine the size and location of its facilities and costs until the permits are obtained, and its inability to proceed with the permitting process if the waiver is not granted.

A waiver is necessary because the utility will not be able to determine the size, location and the associated costs it needs for its treatment facilities until the specific locations of the applicant's water and wastewater facilities have been determined. Once the utility's treatment facilities are selected and sized, the utility may complete its application for the necessary permits and will be able to determine how much land it requires for its treatment facilities. The owner of the land on which the proposed service area is situated has provided assurance that he will either convey title to the applicant to all land necessary for water and wastewater treatment plants and appurtenant facilities, or enter into a long-term (99-year) lease (see Exhibit "E" to the application).

When a utility has met the criteria set forth in Section 120.542, F.S., the Commission has granted a temporary waiver of the rules regarding establishment of initial rates and charges and bifurcated the two parts of its certification proceedings.³ In this case, the applicant has met the underlying purpose of Sections 367.031 and 367.045, F.S. The applicant has shown that it will suffer substantial hardship if all of the provisions of Rule 25-30.033, F.A.C., are strictly applied.

The applicant has requested a waiver of the above-noted subsections of Rule 25-30.033(1), F.A.C., until it receives its other permits and is closer to commencing operations. The applicant states that it will file its proposed tariffs and other required financial schedules to set initial rates sufficiently in advance of providing service, so that the Commission will have sufficient time for review. Staff recommends that the utility has met the requirements found in Section 120.542, F.S., and the Commission should grant the applicant's Motion for Temporary Rule Waiver of Rule 25-30.033(1)(h), (j), (k), (m), (r), (t), (u), (v), and (w), F.A.C., until it has completed its permitting and is closer to commencement of operations.

² See, Order No. PSC-98-1644-FOF-WS, issued December 7, 1998, in Docket No. 980876-WS, In re: Application for certificate to operate water and wastewater facility in Marion County by Ocala Springs Utilities, Inc. and Order No. PSC-05-0844-PAA-WS, issued August 18, 2005, in Docket No. 050192-WS, In re: Application for certificates to provide water and wastewater service in Sumter County by Central Sumter Utility Company, L.L.C.

³ Id.

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Issue 2: Should this docket be closed?

Recommendation: No. If no timely protest is received from a substantially affected person within 21 days of the date of the Proposed Agency Action Order, the Order will become final upon the issuance of a Consummating Order. However, the docket should remain open pending Commission action on the Grove's application for original water and wastewater certificates. (Jaeger)

Staff Analysis: No. If no timely protest is received from a substantially affected person within 21 days of the date of the Proposed Agency Action Order, the Order will become final upon the issuance of a Consummating Order. However, the docket should remain open pending Commission action on the Grove's application for original water and wastewater certificates.