

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against East Marion Water Distribution, Inc. in Marion County for failure to file 1996 annual report in accordance with Rule 25-30.110(3), F.A.C.

DOCKET NO. 980099-WU  
ORDER NO. PSC-98-0753-FOF-WU  
ISSUED: June 1, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION  
ORDER GRANTING WAIVER OF RULES 25-30.110, (6) (c) and (7),  
FLORIDA ADMINISTRATIVE CODE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

East Marion Water Distribution, Inc., (East Marion or utility) is a Class C water utility operating in Marion County. According to the 1991 annual report, East Marion provides water service to two customers with approximately \$750 in operating revenues. The system was inactive from 1992 until 1995.

According to the utility's application for transfer of majority organizational control, in Docket No. 971269-WS, the contract for sale and purchase of land and the utility between the

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First Bank of Osceola, the transferor, and Mr. Herbert Hein, the transferee, was executed on February 21, 1995.

Neither the contract for sale nor the application stated that the sale was contingent upon the Commission's approval. Because Mr. Hein had ownership and/or control of the utility and has been operating the utility since May of 1995, we requested payment of regulatory assessment fees and annual reports for 1995 forward from Mr. Hein's agent, Mr. Len Tabor. Due to the utility's renewed activity, we also requested that the utility file its annual report for 1996.

The utility filed its 1996 annual report on February 2, 1998, and our staff determined that there were no deficiencies. By letter dated March 10, 1998, the utility was notified that the total penalty for untimely filing its 1996 annual report was \$741 (247 days x \$3.00 per day) and that payment was due by March 30, 1998. On March 10, 1998, our staff was contacted by Mr. Hein, regarding the possibility of filing a petition for rule waiver or variance of the rule with respect to the penalties. Information regarding filing a petition for rule waiver was forwarded via facsimile. Our staff sent a follow-up letter to Mr. Hein on March 31, 1998, to determine what actions the utility would undertake to comply with the Commission rule. On April 6, 1998, the utility filed a petition for rule waiver of Rules 25-30.110(6)(c) and (7), Florida Administrative Code.

The transfer of majority control is being handled separately in Docket No. 971269-WS. This Order addresses the utility's petition for rule waiver.

Pursuant to Section 120.542(6), Florida Statutes, on April 6, 1998, we provided notice to the Department of State, which published notice of the waiver request in the Florida Administrative Weekly. After reviewing the petition, our staff found no deficiencies. We did not receive any comments regarding the utility's petition. Pursuant to Section 120.542(8), Florida Statutes, we are required to issue an order in writing granting or denying the petition for waiver or variance stating the relevant facts and reasons supporting our decision within 90 days after receipt of the original petition.

RULE WAIVER

On April 6, 1998, East Marion filed a petition for rule waiver of Rules 25-30.110(6)(c) and (7), Florida Administrative Code. The utility sought a waiver because it believed the underlying purpose of the statute has been served in that the utility filed its 1996 annual report on February 2, 1998. Our staff determined that the utility's 1996 annual report was not deficient, thus the report was in compliance with Rules 25-30.110(6)(c) and (7), Florida Administrative Code. To date, the 1995 annual report has not been filed.

In East Marion's petition, the utility stated that the application of the rule would create a substantial hardship on its operations in that the previous owners died and the previous records were otherwise nonexistent. The utility also stated that First Bank of Osceola, the interim owner of East Marion, did not maintain records on the utility. Despite the utility's circumstances, East Marion's new owner, Mr. Hein, hired a certified public accountant to prepare the 1996 annual report. East Marion has also timely filed its annual report for 1997. Further, the utility has incurred losses of \$16,862 for 1996 and \$15,024 for 1997.

The utility also stated in its petition that if we ordered the utility to file a 1995 annual report, such action "would only serve to increase the operating losses of the company and absorb funds needed to keep East Marion operational." Finally, the utility's petition stated that little purpose would be served in requiring it to file its 1995 annual report as the utility only renewed activity in 1996 and the pertinent information is contained in its 1996 and 1997 annual reports.

SUMMARY AND DISPOSITION OF FINDINGS

The underlying statutes pertaining to the rule in this instance are Sections 367.121(1)(c) and 367.161(2), Florida Statutes. Section 367.121, Florida Statutes, provides that we shall require regular reports from utilities under our jurisdiction consistent with the uniform system and classification of accounts and may require preparation of the reports by a certified public accountant. Rule 25-30.110(3)(a), Florida Administrative Code, which requires utilities subject to our jurisdiction to file an annual report on or before March 31 of the following year, implements Section 367.121, Florida Statutes. Section 367.161(2),

Florida Statutes, provides that we have the power to impose penalties on utilities under our jurisdiction who have refused to comply or wilfully violate Florida Statutes, Commission rules, or orders. Rules 25-30.110(6)(c) and (7), Florida Administrative Code, which provides for penalties of \$3.00 per day for a Class C utility for failure to timely file its annual report, implements Section 367.161, Florida Statutes. The purpose of requiring payment of penalties for late filing is to ensure compliance with Florida Statutes and Commission rules.

Section 120.542(2), Florida Statutes, in pertinent parts, provides that "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 that application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, substantial hardship means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver."

We find that the utility has demonstrated a substantial technological and economic hardship. The current owner bought the utility in 1995. The previous owners of the utility died and the records of the utility were not maintained by the interim owner. The new owner hired a certified public accountant and had the 1996 annual report prepared. Also, the utility continues to lose money. Ordering the new owner to remit the penalties for untimely filing its 1996 annual report and to spend the money to prepare a 1995 annual report would only add to the substantial economic hardship of the utility.

We also find that the underlying purpose of the statute has been achieved. The utility filed its 1996 annual report as well as timely filed its 1997 annual report. Records on the utility's operations were not maintained when the new owner acquired the utility in 1995. Because we now have the relevant information regarding the utility's operations pursuant to Florida Statutes and our rule, the underlying purpose of the statute has been achieved.

Based on the foregoing, East Marion's petition for rule waiver is granted because the utility has demonstrated that a waiver of Rules 25-30.110(6)(c) and (7), Florida Administrative Code, would serve the underlying purpose of Sections 367.121 and 367.161 Florida Statutes, and the application of the rule would create a substantial hardship for the utility.

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Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that East Marion Water Distribution, Inc.'s petition for rule waiver be granted. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 1st day of June, 1998.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

  
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Kay Flynn, Chief  
Bureau of Records

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice

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should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on June 22, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.