

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-**

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**DATE:** February 22, 2018

**TO:** Office of Commission Clerk (Stauffer)

**FROM:** Office of the General Counsel (Page) *PNP J.M.C.*  
Division of Economics (Daniel, Hudson) *SH*

**RE:** Docket No. 20170259-WU – Petition for declaratory statement regarding the applicability of approved water service availability charges in Lake County, by Harbor Waterworks, Inc.

**AGENDA:** 03/01/18 – Regular Agenda – Petition for Declaratory Statement - Participation is at the Commission's discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Polmann

**CRITICAL DATES:** March 12, 2018 – Order must be issued by this date pursuant to Section 120.565(3), F.S.

**SPECIAL INSTRUCTIONS:** None

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### Case Background

On December 12, 2017, Harbor Waterworks, Inc. (Harbor Waterworks), a water and wastewater utility regulated by the Commission, filed a Petition for Declaratory Statement (Petition) regarding the applicability of Commission approved water service availability charges to an irrigation connection for homes in Phase 6 of the Harbor Hills subdivision. Pursuant to Rule 28-105.0024, Florida Administrative Code (F.A.C.), a Notice of Declaratory Statement was published in the December 14, 2017 edition of the Florida Administrative Register to inform interested persons of the petition.

On January 4, 2018, Harbor Hills Development LP (Development) and Harbor Hills Homeowners' Association, Inc. (Association) filed a Petition to Intervene and requested full

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party status in the declaratory statement proceeding. By Order No. PSC-2018-0083-PCO-WU, issued February 16, 2018, intervention was granted to the Development and the Association. The Intervenors filed a response to Harbor Waterworks' Petition for Declaratory Statement on February 19, 2018.

This recommendation addresses Harbor Waterworks Inc.'s Petition for Declaratory Statement. Pursuant to Section 120.565(3), F.S., a final order on the Petition for Declaratory Statement must be issued within 90 days. The statutory deadline for this declaratory statement proceeding is March 12, 2018. The Commission has jurisdiction pursuant to Section 120.565 and Chapter 367, F.S.

## Discussion of Issues

**Issue 1:** Should the Commission grant Harbor Waterworks' Petition for Declaratory Statement?

**Recommendation:** The Commission should grant the Petition to the extent that it addresses the very narrowly framed question posed in staff's analysis and declare that Order Nos. 23039 and 23039-A, which established service availability charges for Harbor Waterworks, apply to the utility's irrigation connections. The Commission should state that the declaratory statement is controlling only as to the facts described in Harbor Waterworks' Petition and would not apply to different, alternative facts. (Page)

**Staff Analysis:** The Commission should grant the Petition and declare that the service availability charges established in Order Nos. 23039 and 23039-A, apply to Harbor Waterworks' irrigation connections. Below is staff's analysis.

### Law Governing Petitions for Declaratory Statement

Section 120.565, F.S., sets forth the necessary elements of a petition for declaratory statement. This section provides:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., states the purpose of a declaratory statement:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002(5), F.A.C., requires that a petition for declaratory statement include a description of how the statutes, rules or orders may substantially affect the petitioner in the petitioner's particular set of circumstances. A party seeking a declaratory statement must not only show that it is in doubt as to the existence of some right or status, but also that there is a bona fide, actual, present, and practical need for the declaration. *State Department of Environmental Protection v. Garcia*, 99 So. 2d 539, 544-45 (Fla. 3d DCA 2011). A declaratory statement is intended to enable members of the public to definitely resolve ambiguities of law in the planning of their future affairs and to enable the public to obtain definitive binding advice as to the applicability of agency law to a particular set of facts. *Department of Business and*

*Professional Regulation, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999).

## **Harbor Waterworks' Petition for Declaratory Statement**

### ***Harbor Waterworks' particular circumstances and facts***

Harbor Waterworks' water service availability charges, including the plant capacity charge, main extension charge, meter installation fee, and tap fee, were established by the Commission in Order No. 23039, Docket No. 890554-WU, issued June 6, 1990, *In re: Application of Lake Griffin Utilities, Inc. for Water Certificate in Lake County*. Order No. 23039 was amended by Order No. 23039-A, issued June 11, 1990, to include allowance for funds prudently invested (AFPI) charges that were inadvertently omitted from the prior order. The water service availability charges for Harbor Waterworks have not been revised by the Commission since that time.

According to Order Nos. 23039 and 23039-A and Harbor Waterworks' approved tariffs, the water service availability charges for both Main Extension Charges and Plant Capacity Charges are based upon one equivalent residential connection set at 350 gallons per day (GPD). This equates to approximately 10,500 gallons per month (350 GPD x 30 days).

As stated in the Petition, based on historical actual water usage for the 12 month period October 2016 through September 2017, the average residential water usage for Harbor Waterworks is 38,751 gallons per month for all existing customers. The average irrigation only usage for the existing homes in Phase 6 for the same 12 month period was approximately 44,000 gallons a month. The utility asserts that this does not include the potable water used inside the homes, which goes through a separate meter. Harbor Waterworks contends that these irrigation connections are placing additional capacity demands upon the existing water system.

Harbor Waterworks states that due to excessive water consumption, it received a letter of non-compliance with its St. Johns River Water Management-issued consumptive use permit. Also, Harbor Waterworks states that it is in the process of obtaining additional land to install a back-up well to meet the current demand on the water system in case one of the existing wells becomes inoperable. Harbor Waterworks asserts that without the additional back-up well, it would be unable to meet the current demand in the event one of the existing wells cannot operate.

The Development has been and is presently building and selling homes in the Phase 6 area of the Harbor Hills subdivision. There are approximately 53 residential homes currently being served by Harbor Waterworks in Phase 6. The Development previously installed separate irrigation lines in Phase 6 that are interconnected into Harbor Waterworks potable water mains in the subdivision. The water provided via the irrigation main lines is finished potable water from Harbor Waterworks' water treatment system and distribution mains.

Harbor Waterworks states that it recently bought the separate irrigation lines installed by the Development that are presently used to provide irrigation water service to its customers in Phase 6. According to the Petition, prior to its purchase of the separate irrigation lines from the Development, Harbor Waterworks was only collecting a meter installation charge for the new homes in Phase 6.

After Harbor Waterworks bought the separate irrigation lines, the Development requested a statement of charges from Harbor Waterworks. On October 25, 2017, the utility provided an invoice of charges to the Development that indicated the service availability charges for new construction homes in Phase 6. The utility attached the invoice to its Petition. The charges for the potable water connection and the separate irrigation water lines were identified. The Petition states that the Development has contested the separate charges for the irrigation service.

***Statutes, Rules, and Commission Orders Applicable to Harbor Waterworks' Facts***

In its Petition, Harbor Waterworks states that its declaratory statement is sought on the following statutes, rules, and orders:

Section 367.091(4), F.S., which states in part that:

A utility may only impose and collect those rates and charges approved by the Commission for the particular class of service involved. A change in any rate schedule may not be made without commission approval.

Section 367.101(1), F.S., addresses service availability charges and states:

The Commission shall set just and reasonable charges and conditions for service availability. The Commission by rule may set standards for and levels of service-availability charges and service-availability conditions. Such charges shall be just and reasonable.

Rule 25-30.515(8), F.A.C., defines an Equivalent Residential Connection as:

- (a) 350 gallons per day;
- (b) The number of gallons a utility demonstrates is the average daily flow for a single residential unit; or
- (c) The number of gallons which has been approved by the Department of Environmental Protection for a single residential unit.

Commission Order No. 23039, issued June 6, 1990, in Docket No. 890554-WU, *In re: Application of Lake Griffin Utilities, Inc. for Water Certificate in Lake County*, which set the service availability charges for Harbor Waterworks.

Commission Order No. 23039-A, issued June 11, 1990, in Docket No. 890554-WU, *In re: Application of Lake Griffin Utilities, Inc. for Water Certificate in Lake County*, which amended Order No. 23039 to include the AFPI charges for Harbor Waterworks that were inadvertently omitted from Order No. 23039.

***Declaratory Statement requested by Harbor Waterworks***

In paragraph 24 of its Petition, Harbor Waterworks requests that the Commission issue a declaratory statement confirming that at a minimum the second irrigation connection to homes in Phase 6 are subject to the FPSC approved service availability charges including:

- a. Plant Capacity Charge,
- b. Main Extension Charge,
- c. Service Installation Charge,
- d. Meter Installation Fee, and
- e. AFPI charge.

**Intervenors: The Development and The Association**

The Development and the Association have intervened in this proceeding. They assert that the Petition is the incorrect procedural mechanism for the relief requested by the utility and that the utility should not be allowed to use this procedure as an “end around” of the application process for new charges and rates.

The Intervenors allege that the Petition seeks permission to impose and collect charges that are not contained in Order Nos. 23039 and 23039-A. They assert that to the extent Harbor Waterworks wants to collect charges not contained in the Orders and the utility’s tariffs, Harbor Waterworks should apply for approval of new charges and rates. They assert that the charges contained in the invoice attached to the Petition effectively double the connection charges that were previously being imposed and collected.

They state that the separate charges for irrigation connections that Harbor Waterworks seeks to impose and collect are not permitted under applicable rules and are not warranted. They contend that while there may be separate lines for irrigation service, the irrigation lines are interconnected into the potable water mains in the subdivision: “Given that there is only one connection to the utility’s main, there should only be one connection charge imposed.”

The Intervenors further state that the utility has not provided any evidence demonstrating how the additional charges for irrigation actually relate to the cost incurred by the utility. They opine that “such evidence also would be important considering that the most recent annual report for Harbor Waterworks appears to show a rate of return for water services in excess of 24%.”

**Staff Analysis on Harbor Waterworks’ Petition**

***Harbor Waterworks’ has met pleading requirements to issue declaratory statement***

The Development and the Association raise the issue of whether a declaratory statement is the proper procedural mechanism for the resolution of the question raised by Harbor Waterworks. The purpose of a declaratory statement is to address the applicability of statutory provisions, orders, or rules of the agency in particular circumstances. *See Chiles v. Department of State, Division of Elections*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998). One of the purposes of a declaratory statement is to help avoid costly administrative litigation. *Id.* at 151; *Citizens of the State of Florida v. Florida Public Service Commission and Utilities, Inc.*, 164 So. 3d 58, 62 (Fla. 1st DCA 2015).

According to Harbor Waterworks' Petition, the Development requested service availability letters with the appropriate service availability charges for new construction of homes in Phase 6. Harbor Waterworks' Petition further states that the Development has contested the separate charges for the irrigation service.

In point of fact, Harbor Waterworks has assessed the fee; however, it has not collected the fee because the Development called into question the assessment. Rule 28-105.001, F.A.C., provides that a declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules or orders over which an agency has authority. Harbor Waterworks has set forth in its Petition that it has a question concerning the applicability of Order Nos. 23039 and 23039-A to its particular facts and circumstances. Further, in the absence or denial of a declaratory statement, staff believes that this situation may likely result in administrative litigation and that a declaratory statement may help avoid costly litigation. *See Chiles* 711 S. 2d at 151; *Citizens of the State of Florida*, 164 So. 3d at 62.

The Intervenors assert in their response to the Petition that Harbor Waterworks seeks permission to impose and collect charges that are not contained in Order Nos. 23039 and 23039-A and point to the invoice attached to the Petition as evidence thereof. However, the question Harbor Waterworks is asking the Commission to address may be framed very narrowly as whether the service availability charges established in Order Nos. 23039 and 23039-A apply to irrigation connections. As a result, staff does not believe that the Petition, as framed, is an "end around" of the application process for new charges and rates.

#### ***Declaratory Statement that should be issued***

Staff recommends that the Commission declare that based on the facts set forth in Harbor Waterworks' Petition, the service availability charges established in Order Nos. 23039 and 23039-A apply to the utility's irrigation connections. Order No. 23039 states that the service availability charges established in the order apply to connections made on or after the stamped approval date on the tariff sheets. The Order does not distinguish between water connections and irrigation connections.

Service availability charges are designed to reimburse the utility for a portion of the cost of its facilities based on the customers' potential demand on the system. *See* Rule 25-30.530(3)(c)2., F.A.C. (stating that the costs to be charged to a particular customer shall be determined according to the hydraulic demand of the customer) and Rule 25-30.515(12), F.A.C. (stating that the main extension charge is determined on a hydraulic share basis). As the water provided via the irrigation connections is finished potable water from Harbor Waterworks' water treatment system and distribution mains, all water demand, including irrigation service, place a demand on Harbor Waterworks' potable water system. The service availability charges established by Order Nos. 23039 and 23039-A were designed to reimburse the utility for a portion of its investment in the facilities used to provide water service, including irrigation service.

The rationale as to why the Commission establishes service availability charges and why service availability charges would apply to irrigation connections is illustrated by the facts set forth in Harbor Waterworks' Petition. The utility alleges in its Petition that the irrigation connections are

placing additional capacity demands upon the existing water system. The demand a customer places on the water system should be the basis for determining the appropriate service availability charges. *See id.*

The Development and the Association assert that Harbor Waterworks is using the declaratory statement procedure in lieu of an application for new charges and rates. Staff disagrees. Harbor Waterworks has always had the ability under Order Nos. 23039 and 23039-A and its tariff to charge for additional demand any customer, including irrigation customers, may place on the system.

Rule 28-105.001, F.A.C., states that a declaratory statement is not the appropriate means for determining the conduct of another person. Staff agrees with the Intervenors that a declaratory statement proceeding is not the proper vehicle to change Commission-approved service availability charges. To the extent Harbor Waterworks' Petition may be construed as a request to increase the utility's service availability charges in Order Nos. 23039 and 23039-A and the utility's tariffs, the Petition should be denied. To the extent Harbor Waterworks may be requesting the Commission to confirm that the charges in the invoice attached to its Petition are correct or that the Development or the Association must pay the service availability charges assessed in the invoice, the Petition should also be denied.

### **Conclusion**

For the reasons set forth above, staff recommends that the Commission should grant the Petition to the extent that it addresses the very narrowly framed question posed in staff's analysis and declare that Order Nos. 23039 and 23039-A, which established service availability charges for Harbor Waterworks, apply to the utility's irrigation connections. The Commission should state that the declaratory statement is controlling only as to the facts described in Harbor Waterworks' Petition and would not apply to different, alternative facts.

**Issue 2:** Should this docket be closed?

**Recommendation:** Yes, if the Commission votes to either grant or deny the Petition for Declaratory Statement, the docket should be closed.

**Staff Analysis:** Whether the Commission grants or denies the petition, a final order will be issued. Upon issuance of the final order, the docket should be closed.