

REQUEST TO ESTABLISH DOCKET
(PLEASE TYPE)

Date 11/2/96

Docket No. 961417-

1. Division Name/Staff Name Division of Legal Services (LAW) / REYES
2. OPR Legal - LAW (REYES)
3. OCR LAW (MC CASKILL)

4. Suggested Docket Title Response to Commission Order to Show Cause
by Hudson Utilities, Inc. in Pasco County
L d/b/a Hudson Bay Company

5. Suggested Docket Mailing List (attach separate sheet if necessary)

- A. Provide NAMES ONLY for regulated companies or ACRONYMS ONLY regulated industries,
as shown in Rule 25-22.104, F.A.C.
B. Provide COMPLETE name and address for all others. (Match representatives to clients.)

1. Parties and their representatives (if any)

Hudson Utilities, Inc.
Rutledge, Eckenia, Underwood,
Dunnell & Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302

2. Interested Persons and their representatives (if any)

6. Check one:

- Documentation is attached.
 Documentation will be provided with the recommendation.

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PSC/RAR 10 (Revised 01/96)

DOCUMENT NUMBER-DATE

12645 NOV 26 96

FPSC-RECORDS/REPORTING

Reg

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Proposed rate reduction)
to reflect a decrease in)
purchased water and wastewater)
costs to FPSC-regulated)
utilities, by Pasco County.)

Docket No. 960878-WS
Filed: October 17, 1996

**HUDSON UTILITIES, INC.'S RESPONSE
TO ORDER TO SHOW CAUSE AND REQUEST
FOR TEMPORARY WAIVER**

Hudson Utilities, Inc. ("Hudson"), by and through its undersigned counsel, hereby files its Response to the September 27 Order to Show Cause ("Order") issued in this docket. Hudson also requests the Commission for a temporary waiver of that portion of the Order requiring Hudson to file the information required under Rule 25-30.425(1)(a) through (f), Florida Administrative Code, along with a calculation of the potential rate decrease, for a period of up to twenty (20) days after the Commission vote on whether Hudson must reduce its rates, if such rate reduction is ordered.

The Order requires Hudson, among other utilities, to demonstrate why its wastewater rates should not be reduced, effective April 1, 1996, to reflect the reduction in Pasco County's rates for bulk wastewater treatment and disposal. Hudson will address this issue first and then outline the grounds for its request for a temporary waiver pending the Commission's disposition of the rate reduction issue.

DOCUMENT NUMBER-DATE
11146 OCT 17 96
FPSC-RECORDS/REPORTING

**I. HUDSON IS NOT REQUIRED TO PASS-THROUGH
DECREASE IN EXPENSES PAID TO PASCO COUNTY ...
BULK WASTEWATER TREATMENT**

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As outlined in the August 22, 1996 Staff Recommendation, Pasco County has reduced its bulk wastewater rate from \$3.11 to \$2.20 per thousand gallons effective April 1, 1996 with a slight increase from \$2.20 to \$2.23 per thousand gallons effective October 1, 1996.¹ The Commission Staff has taken the position that Hudson must pass-through this reduction in costs effective April 1, 1996. The Staff's position is inconsistent with the plain meaning and intent of Section 367.081(4)(b), Florida Statutes (1995) and should be rejected.

Section 367.081(4), Florida Statutes, provides in pertinent part:

(b) The approved rates of any utility which receives all or any portion of its utility service from a governmental authority or from a water or wastewater utility regulated by the commission and which redistributes that service to its utility customers shall be automatically increased or decreased without hearing upon verified notice to the commission 45 days prior to its implementation of the increase or decrease that the rates charged by the governmental authority or other utility have changed.

(c) Before implementing a change in rates under this subsection, the utility shall file an affirmation under oath as to the accuracy of the figures and calculations upon which the change in rates is based, stating that the change will not cause the utility to exceed the range of its last authorized rate of

¹These rates exclude Pasco County's capacity charge of \$1.00 per thousand gallons.

return on equity.

(emphasis supplied).

Where the words of a statute are clear and unambiguous, the statute must be given its plain and ordinary meaning. Judicial interpretation is not appropriate to extend, modify, limit or displace the express terms of a clear and unambiguous statute nor the intent reflected by such terms. Zuckerman v. Alter, 615 So.2d 661, 663 (Fla. 1993); Steinbrecher v. Better Construction Co., 587 So.2d 492, 493 (Fla. 1st DCA 1991); Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984); Citizens v. Public Service Commission, 435 So.2d 784, 786 (Fla. 1983); Heredia v. Allstate Ins. Co., 358 So.2d 1353, 1354-55 (Fla. 1978). The Commission, like a court, is bound to follow the plain language of a clear and unambiguous statute.

There is nothing ambiguous about the Section 367.081(4) mechanism for passing through an increase or decrease in the cost of service provided by a governmental authority or another utility. Under Section 367.081(4)(b), the pass-through may only be triggered "upon verified notice to the commission" by the utility. The fact that it is the utility and only the utility who may trigger a pass-through increase or decrease is confirmed by the Commission pass-through rule which provides that "[p]rior to an adjustment in rates because of an increase or decrease in purchased utility service, the utility shall file" the required pass-through information.²

The August 22, 1996 Staff Recommendation and the Order itself attempt to avoid the plain meaning of Section 367.081(4)(b) by

²Fla. Admin. Code R. 25-30.425(1) (emphasis supplied).

suggesting that a pass-through rate decrease may be implemented through a Section 367.0822(1), Florida Statutes, limited proceeding.³ Section 367.0822(1), Florida Statutes, provides as follows:

(1) Upon petition or by its own motion, the commission may conduct limited proceedings to consider, and act upon, any matter within its jurisdiction, including any matter the resolution of which requires a utility to adjust its rates. The commission shall determine the issues to be considered during such a proceeding and may grant or deny any request to expand the scope of the proceeding to include other related matters. However, unless the issue of rate of return is specifically addressed in the limited proceeding, the commission shall not adjust rates if the effect of the adjustment would be to change the last authorized rate of return.

(Emphasis supplied).

A careful analysis and comparison of the pass-through statute (Section 367.081(4)(b)) and the limited proceeding statute (Section 367.0822) reveal two critical distinctions. First, Section 367.081(4)(b) expressly provides that a pass-through shall be implemented "without hearing." Section 367.0822(1) clearly contemplates a hearing process. Second, Section 367.0822(1), unlike Section 367.081(4)(b), authorizes a limited proceeding on the Commission's own motion.

The limited proceeding statute is similar to other Commission statutes where the Legislature has specifically authorized the Commission to resolve an issue on its own motion. See, e.g.,

³See August 22, 1996 Staff Recommendation, at 5-6 and Order, at 2-3.

§366.04(2)(e), Fla. Stat. (1995) (territorial disputes between electric utilities). No such authority was granted to the Commission in the case of pass-throughs under Section 367.081(4)(b). Clearly, if the Legislature intended to grant the Commission the authority to implement a pass-through increase or decrease on its own motion, and to utilize a procedure for hearings, it would have been a simple matter to insert the appropriate language in Section 367.081(4)(b). See, e.g., Sumner v. Board of Psychological Examiners, 555 So.2d 919, 921 (Fla. 1st DCA 1990); Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577, 582 (Fla. 1964). Moreover, as a matter of statutory interpretation, the specific subject matter addressed in the pass-through statute and the language contained therein control over the wide variety of issues potentially addressed through the limited proceeding statute. As the Florida Supreme Court stated in McKendry v. State, 641 So.2d 45, 46 (Fla. 1994):

[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. (citations omitted). The more specific statute is considered to be an exception to the general terms of the more comprehensive statute. (citations omitted).

The absence of statutory language granting the Commission authority to implement a pass-through increase or decrease on its own motion coupled with the presence of language in Section 367.081(4)(b) expressly stating that such pass throughs are to be implemented "without hearing upon verified notice to the

commission" confirm the Legislature's intent that pass-throughs were not intended to be implemented, on the Commission's own motion (i.e., an order to show cause), through a limited proceeding. To argue otherwise would violate the prohibition against reading words into a statute, in this case, Section 367.081(4)(b). James Talcott, Inc. v. Bank of Miami Beach, 143 So.2d 657, 659 (Fla. 3d DCA 1962) (where a statute is clear and unambiguous, the court may not steer it to a meaning which its plain wording does not supply); Armstrong v. Edgewater, 157 So.2d 422, 425 (Fla. 1963) (where there is doubt as to the legislative intent, or when speculation is necessary, the doubt should be resolved against the power of the court to supply missing words).

Moreover, a common sense reading of Section 367.081(4)(b) and (c) clearly supports the conclusion that the Legislature did not intend to mandate pass-through increases or decreases. Where legislative language is susceptible of more than one interpretation, courts are required to adopt the interpretation that will avoid an unreasonable result. Catron v. Roger Bohn, D.C., P.A., 580 So.2d 814, 818 (Fla. 2d DCA 1991) and cases cited therein.

Here, Section 367.081(4)(c) disallows a pass-through increase if the impact of the increase is to cause the utility to exceed the top of the range of its last authorized rate of return on equity. Thus, the Legislature authorized the Commission to ensure that a pass-through increase will not cause the utility to overearn. The only fair, equitable and symmetrical interpretation of the statute

is that in the case of an underearning utility, such as Hudson, the Legislature intended to allow the utility to forego a pass-through decrease if the impact of foregoing the pass-through decrease leaves the underearning utility in an improved financial situation yet below the bottom of the range of its last authorized rate of return on equity. As shown in Exhibit A, Hudson's current authorized rate of return is 12.73 percent. In 1995, Hudson had an achieved rate of return of less than 1 percent. By not passing through the Pasco County reduction in purchased sewage treatment costs, Hudson's 1995 earnings climb to a meager 2.74 percent, well below its authorized 12.73 percent rate of return. It is simply not credible to assert that the Legislature intended to prevent an underearning utility such as Hudson from improving its deteriorated earnings status by mandating a pass-through reduction.

Injecting the prospect of a limited proceeding only further supports the conclusion that the Legislature did not intend to mandate a pass-through reduction on an underearning utility. If Hudson were required to incur the cost of a limited proceeding to challenge the imposition of the pass-through reduction, the only sensible response on the part of Hudson would be to either seek expansion of the limited proceeding in pursuit of increased revenues to allow it to earn a reasonable rate of return or simply file a full-blown rate case. By stepping outside of its statutory authority and mandating a pass-through reduction through a limited proceeding, the Commission is essentially inviting utilities to file rate cases, a policy which is obviously counter-productive and

not in the public interest.

The final issue to be addressed concerns the prospect that any mandated reduction would be applied retroactively to April 1, 1996. Such a proposal violates the prohibition against retroactive ratemaking.

The prohibition against retroactive ratemaking means that rates established by the Commission must be applied prospectively -- not retroactively. Westwood Lake, Inc. v. Dade County, 264 So.2d 7, 12 (Fla. 1972); City of Miami v. Florida Public Service Commission, 208 So.2d 249, 260 (Fla. 1968). "Rates are fixed for the future rather than for the past" Gulf Power Company v. Bevis, 289 So.2d 401, 404 (Fla. 1974). Simply put, unlawful retroactive ratemaking occurs when new rates are applied to prior consumption. Citizens of State v. Public Service Commission, 448 So.2d 1024, 1027 (Fla. 1984). Compare GTE Florida Incorporated v. Clark, 668 So.2d 971, 973 (Fla. 1996) ("This is not a case where a new rate is requested and then applied retroactively").

In the instant case, it is beyond dispute that if the Commission requires Hudson to pass-through Pasco County's reduction in costs and applies the resulting new rates retroactively to April 1, 1996 -- new rates would be applied to prior consumption. Under the above-cited decisions, such action by the Commission would violate the proscription against retroactive ratemaking.

The Staff's defense of the April 1, 1996 effective date is not credible. Staff states the following in its Recommendation:

The statute (Section 367.081(4)(b))
contemplates that a utility may choose not to

apply for a pass-through increase immediately when it states:

A utility may not use this procedure to increase its rates as a result of ... an increase in the cost of purchased water services [or] wastewater services ... which increase was initiated more than 12 months before the filing by the utility.

However, decreases are not mentioned in this provision, which leads Staff to conclude that decreases are to be effective as soon as is practicable and that the utility has no discretion in the timing of the implementation of decreases.⁴

Staff's rationale in support of a retroactive application of the pass-through decrease is faulty. The portion of Section 367.081(4)(b) cited by Staff simply means that a utility that wishes to pass-through an increase must do so (by filing) within 12 months of the effective date of the increase to be passed through. The provision does not, as asserted by Staff, prohibit a utility from immediately filing for the increase after the increase becomes effective. Staff's assertion that this provision implies "that decreases are to be effective as soon as is practicable"⁵ defies logic and certainly does not avoid the illegal retroactive impact of an April 1, 1996 effective date. To the contrary, the cited provision of Section 367.081(4)(b) only leads further support to the conclusion that it is only the utility which may trigger a pass-through adjustment in rates.

⁴August 22, 1996 Staff Recommendation, at 7.

⁵Id.

As a final note, the orders cited by the Commission in the Order to Show Cause lend no support whatsoever to the action the Commission suggests it may take in this proceeding. The two orders, involving Hudson⁶ and Florida Water Service, Inc.,⁷ are distinguishable on two material grounds. First, both cases involved steps initially taken by the utility to pass-through a rate decrease. Second, the decreases were not applied retroactively.

II. HUDSON'S REQUEST FOR TEMPORARY WAIVER

The Order requires Hudson to file the pass-through information required by Rule 25-30.425(1)(a) through (f), Florida Administrative Code, along with a calculation of the rate decrease. Hudson requests a temporary waiver of this filing requirement for a period extending up to 20 days following the Commission vote on this issue and only if the Commission determines that Hudson is required to pass-through the Pasco County bulk wastewater rate decrease. In support of this request, Hudson states as follows:

(1) Hudson is a relatively small, financially strapped wastewater utility with limited resources.

(2) The assimilation of the necessary documents and information and the calculation of the new proposed residential,

⁶In re: Limited proceeding for decreased rates for HUDSON UTILITIES, INC. in Dade County, 89 F.P.S.C. 2:83 (1989), Order No. 20728 issued February 13, 1989 in Docket No. 890049-SU.

⁷In re: Application of Florida Water Service, Inc. for pass-through decrease for its Lake Clarke Shores System, 82 F.P.S.C. 7:211 (1982), Order No. 11026 issued July 26, 1982 in Docket No. 820264-W.

general service, multi-residential and bulk flow meter gallonage rates will require significant expenditure of in-house resources and personnel as well as additional costs for outside accounting assistance. Among other things, Hudson would be required to:

(a) Prepare a schedule showing by month the gallons of wastewater treatment purchased and the monthly expenses;

(b) Prepare a schedule showing by month the gallons of wastewater sold for the most recent twelve month period; and

(c) Prepare a schedule setting out by month, customer class and meter size, the gallons of wastewater service sold for the most recent month period.

(3) Once the information is compiled and the above schedules prepared, the new proposed rates must be calculated. This involves computing the difference in purchased wastewater costs using the new rates and then dividing by the gallons sold, for the most recent twelve month period. The resulting decrease per thousand gallons sold is then grossed up for regulatory assessment fees to determine the actual reduction to the gallonage rates.

(4) According to the estimate provided by Hudson's outside accountant, the accounting fees alone to perform the above-described tasks could exceed \$1,500.00.

(5) In light of its current financially distressed status, Hudson maintains that it would be imprudent to require Hudson to undergo the expense and effort to comply with the filing requirements in the Order unless and until the Commission determines that Hudson is required to decrease its rates to pass-

through Pasco County's reduction in its bulk wastewater rate.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated in this Response, Hudson respectfully requests the Commission to enter an order determining that Hudson is not required to pass-through Pasco County's reduction in its bulk wastewater rate. In addition, Hudson requests a temporary waiver of that portion of the Order to Show Cause requiring Hudson to file the Rule 25-30.425(1)(a) through (f), F.A.C., information and the calculation of the rate decrease for a period of up to 20 days following a Commission vote requiring Hudson to pass-through the Pasco County rate decrease if such determination is made by the Commission.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQ.
WILLIAM B. WILLINGHAM, ESQ.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302
(904) 681-6788

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Hudson Utilities, Inc.'s Response to Order to Show Cause and Request for Temporary Waiver was furnished by U. S. Mail to the following this 17th day of October, 1996:

Matthew Feil, Esq.
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703

F. Marshall Deterding, Esq.
2548 Blairstone Pines Drive
Tallahassee, FL

Bobbie L. Reyes
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850



KENNETH A. HOFFMAN, ESQ.

Hudson response

Hudson Utilities, Inc.
Schedule of Rate Base and Rate of Return
December 31, 1995

	Actual 12/31/95	Purchased Sewage Adjustment	Adjusted 12/31/95
Utility plant in service	\$ 3,322,816		\$ 3,322,816
Accumulated depreciation	(473,389)		(473,389)
Contributions in Aid of Construction	(1,380,257)		(1,380,257)
Accumulated amortization of CIAC	247,173		247,173
Working capital allowance	55,490	(A) \$ (7,050)	48,440
CIAC tax-invested portion	151,408		151,408
 Rate base	 \$ 1,923,241	 \$ (7,050)	 \$ 1,916,191
 Utility operating income (Schedule No. 2)	 \$ 17,394	 \$ 35,172	 \$ 52,566
 Achieved rate of return	 0.90%	 1.84%	 2.74%
 Adjustment			
(A) Working capital			
Calculation based on adjusted operations and maintenance expense (Schedule No. 2, 1/8 of O&M)		\$ 48,440	
Working capital at 12/31/95		(55,490)	
Adjustment required		\$ (7,050)	

EXHIBIT "A"

Schedule No. 1

Hudson Utilities, Inc.
Schedule of Revenue and Operating Expenses
December 31, 1995

	<u>Actual 12/31/95</u>	<u>Purchased Sewage Adjustment</u>	<u>Adjusted 12/31/95</u>
Revenue			
Operating revenue	\$ 629,192		\$ 629,192
Expenses			
Operations & Maintenance (O&M)	443,916	(A) \$ (56,393)	387,523
Depreciation	67,170		67,170
Taxes other than income	90,508		90,508
Income taxes	10,204	(B) 21,221	31,425
	<u>611,798</u>	<u>(35,172)</u>	<u>576,626</u>
Utility operating income	<u>\$ 17,394</u>	<u>\$ 35,172</u>	<u>\$ 52,566</u>
Adjustments			
(A) Purchased sewage expense			
Purchased sewage treatment rate adjustment per 1,000 gallons		\$ (0.91)	
Total 1995 purchased sewage treatment (000)		<u>61,970</u>	
Adjustment to O&M expenses		<u>\$ (56,393)</u>	
(B) Income taxes			
Taxable income increase for purchased sewage treatment adjustment (A)		\$ 56,393	
Effective 1995 tax rate		<u>37.63%</u>	
Adjustment to income taxes		<u>\$ 21,221</u>	