

Commissioners:
JULIA L. JOHNSON, CHAIRMAN
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA



DIVISION OF LEGAL SERVICES
NOREEN S. DAVIS
DIRECTOR
(850) 413-6199

Public Service Commission

December 31, 1997

Ms. Wanda McKeever
Meadow Wood
1820 N. Cherry Terrace
Crystal River, Florida 34429

RE: Docket No. **970758-WU** - Application for transfer of ownership of Meadow Wood in Citrus County from Richard Instine to Wanda McKeever.

Dear Ms. McKeever:

We are in receipt of your letter dated December 11, 1997, in which you requested a copy of the Statute requiring the application filing fee. Ms. Crosby's letter to you dated October 16, 1997, quoted Section 367.071(3), Florida Statutes, in part. However, as requested, enclosed is a copy of Section 367.071, Florida Statutes. Also enclosed is a copy of Section 120.542, Florida Statutes, which states that an agency is not authorized to grant variances or waivers to statutes.

Your application for approval of the transfer and request for waiver of filing fee was taken before the Commission on December 16, 1997. At that time, the commission voted to approve the transfer and deny the request for waiver of the filing fee. A copy of Order No. PSC-98-0023-FOF-WU is attached for your information.

If you have additional questions, please do not hesitate to call this office.

Sincerely,

Lila A. Jaber, Chief
Bureau of Water and Wastewater

- ACK _____
- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR _____ LAJ/alc/dr
- EAG _____ Enclosures
- LEG _____
- LIN _____
- OPC _____
- RCH _____
- SEC 1
- WAS _____
- OTH _____

cc: Division of Records and Reporting (Bayo)
Division of Water and Wastewater (Walker, Redemann)
Division of Legal Services (Crosby)

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sumer, utility, or governmental authority or the Public Counsel requests a public hearing on the application, such hearing must, if feasible, be held in or near the area for which application is made, and the transcript of such hearing and any material submitted at or before the hearing must be considered as part of the record of the application and any proceeding related thereto.

(5)(a) The commission may grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest, but may not grant authority greater than that requested in the application or amendment thereto and noticed under this section; or it may deny a certificate of authorization or an amendment to a certificate of authorization, if in the public interest. The commission may deny an application for a certificate of authorization for any new Class C wastewater system, as defined by commission rule, if the public can be adequately served by modifying or extending a current wastewater system. The commission may not grant a certificate of authorization for a proposed system, or an amendment to a certificate of authorization for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

(b) When granting or amending a certificate of authorization, the commission need not consider whether the issuance or amendment of the certificate of authorization is inconsistent with the local comprehensive plan of a county or municipality unless a timely objection to the notice required by this section has been made by an appropriate motion or application. If such an objection has been timely made, the commission shall consider, but is not bound by, the local comprehensive plan of the county or municipality.

(6) The revocation, suspension, transfer, or amendment of a certificate of authorization is subject to the provisions of this section. The commission shall give 30 days' notice before it initiates any such action.

History.—ss. 5, 27, ch. 80-262, § 4, ch. 91-429.

367.071 Sale, assignment, or transfer of facilities or control.

(1) No utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organizational control without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility.

(2) The commission may impose a penalty pursuant to s. 367.161 when a transfer occurs prior to approval by the commission. The transferor remains liable for any outstanding regulatory assessment fees, fines, or refunds of the utility.

(3) An application for proposed sale, assignment, or transfer shall be accompanied by a fee as provided by s. 367.145. No fee is required to be paid by a governmental authority that is the buyer, assignee, or transferee.

(4) An application shall be disposed of as provided in s. 367.045, except that

(a) The sale of facilities, in whole or in part, to a governmental authority shall be approved as a matter of right, however, the governmental authority shall, prior to taking any official action, obtain from the utility or commission with respect to the facilities to be sold the most recent available income and expense statement, balance sheet, and statement of rate base for regulatory purposes and contributions-in-aid-of-construction. Any request for rate relief pending before the commission at the time of sale is deemed to have been withdrawn. Interim rates, if previously approved by the commission, must be discontinued, and any money collected pursuant to interim rate relief must be refunded to the customers of the utility with interest.

(b) When paragraph (a) does not apply, the commission shall amend the certificate of authorization as necessary to reflect the change resulting from the sale, assignment, or transfer.

(5) The commission by order may establish the rate base for a utility or its facilities or property when the commission approves a sale, assignment, or transfer thereof, except for any sale, assignment, or transfer to a governmental authority.

(6) Any person, company, or organization that obtains ownership or control over any system, or part thereof, through foreclosure of a mortgage or other encumbrance, shall continue service without interruption and may not remove or dismantle any portion of the system previously dedicated to public use which would impair the ability to provide service, without the express approval of the commission. This provision may be enforced by an injunction issued by a court of competent jurisdiction.

History.—s. 1, ch. 71-278, § 1, ch. 76-166, § 1, ch. 77-457, ss. 9, 25, 26, ch. 80-99, ss. 2, 3, ch. 81-316, ss. 7, 15, ch. 82-25, ss. 6, 26, 27, ch. 89-263, § 2, ch. 90-165, § 4, ch. 91-429.

367.081 Rates; procedure for fixing and changing.

(1) Except as provided in subsection (4) or subsection (6), a utility may only charge rates and charges that have been approved by the commission.

(2)(a) The commission shall, either upon request or upon its own motion, fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. In every such proceeding, the commission shall consider the value and quality of the service and the cost of providing the service, which shall include, but not be limited to, debt interest; the requirements of the utility for working capital; maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service. However, the commission shall not allow the inclusion of contributions-in-aid-of-construction in the rate base of any utility during a rate proceeding; and accumulated depreciation on such contributions-in-aid-of-construction shall not be used to reduce the rate base, nor shall depreciation on such contributed assets be considered a cost of providing utility service. The commission shall also consider the investment of the utility in land acquired or facilities constructed or to be constructed in the public interest.

(d) An analysis of the impact on small businesses as defined by s. 288.703, and an analysis of the impact on small counties and small cities as defined by s. 120.52.

(e) Any additional information that the agency determines may be useful.

(f) In the statement or revised statement, whichever applies, a description of any good faith written proposal submitted under paragraph (1)(a) and either a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule.

History.—s. 11, ch. 98-158

120.542 Variances and waivers.—

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. Agencies are authorized to grant variances and waivers from the requirements of rules adopted under this section. This section does not authorize agencies to grant variances or waivers to statutes. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) 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 when application of a 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. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(3) The Governor and Cabinet, sitting as the Administration Commission, shall adopt uniform rules of procedure pursuant to the requirements of s. 120.54(5) establishing procedures for granting or denying petitions for variances and waivers. The uniform rules may include procedures for the granting or denial of emergency and temporary variances and waivers. Such provisions may provide for expedited timeframes in the case of such temporary or emergency variances and waivers.

(4) Agencies shall advise persons of the remedies available through this section and shall provide copies of this section, the uniform rules on variances and waivers, and, if requested, the underlying statute, to persons who inquire about the possibility of relief from rule requirements.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

(a) The rule from which a variance or waiver is requested.

(b) The type of action requested.

(c) The specific facts that would justify a waiver or variance for the petitioner.

(d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Weekly. The uniform rules shall provide a means for interested persons to provide comments on the petition.

(7) An agency shall grant or deny a petition for variance or waiver within 90 days of its receipt. If such petition is not granted or denied within 90 days of receipt, the petition shall be deemed approved. An order granting or denying the petition shall be in writing and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

(8) Each agency shall maintain a record of the type and disposition of each petition, including temporary or emergency variances and waivers, filed pursuant to this section. On October 1 of each year, each agency shall file a report with the Governor, the President of the Senate, and the Speaker of the House of Representatives listing the number of petitions filed requesting variances to each agency rule, the number of petitions filed requesting waivers to each agency rule, and the disposition of all petitions. Temporary or emergency variances and waivers, and the reasons for granting or denying temporary or emergency variances and waivers, shall be identified separately from other waivers and variances.

History.—s. 12, ch. 98-158

120.543 Adoption of federal standards.— [Repealed by s. 13, ch. 98-159.]

120.545 Committee review of agency rules.—

(1) As a legislative check on legislatively created authority, the committee shall examine each proposed rule, except for those proposed rules exempted by s. 120.81(1)(d) and (2), and its accompanying material, and each emergency rule, and may examine any existing rule, for the purpose of determining whether:

(a) The rule is an invalid exercise of delegated legislative authority.

(b) The statutory authority for the rule has been repealed.

(c) The rule reiterates or paraphrases statutory material.

(d) The rule is in proper form.

(e) The notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule.

(f) The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer
of ownership of Meadow Wood in
Citrus County from Richard
Instine to Wanda McKeever.

DOCKET NO. 970758-WU
ORDER NO. PSC-98-0023-FOF-WU
ISSUED: January 5, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER APPROVING TRANSFER, DENYING REQUEST FOR
WAIVER OF APPLICATION FEE, AND CLOSING DOCKET

BY THE COMMISSION:

On June 9, 1997, Ms. Wanda McKeever filed an application for approval of the transfer of Meadow Wood in Citrus County from Richard Instine to Wanda McKeever. Meadow Wood is a Class C utility that provides water service to about 37 unmetered residential customers in Citrus County.

Meadow Wood's previous owner, Mr. Instine, passed away in 1996. Prior to his death, Mr. Instine transferred the utility system to Ms. McKeever so that his business affairs would be in order. By letter dated December 16, 1996, Ms. McKeever informed the Commission of Mr. Instine's death, and provided a copy of a warranty deed dated August 30, 1995, conveying ownership of the utility system to her. Section 367.071, Florida Statutes, states, in part, that "no utility shall sell, assign, or transfer its certificate of authorization, facilities, or any portions thereof . . . without approval of the Commission." Although the utility was transferred prior to Commission approval, we do not find it appropriate to initiate show cause proceedings in view of the circumstances surrounding this case.

Application

The application is in compliance with Section 367.071, Florida Statutes, and other pertinent statutes and provisions of the Florida Administrative Code. In particular, the application contains a filing fee in the amount of \$750, pursuant to Rule 25-30.020, Florida Administrative Code. In the application, Ms. McKeever requested a waiver of the filing fee. The request for waiver is discussed later in this Order.

Ms. McKeever provided a copy of a warranty deed as proof of ownership of the land upon which the facilities are located, as prescribed by Rule 25-30.037(2)(g), Florida Administrative Code. Ms. McKeever also provided proof of compliance with the noticing provisions set forth in Rule 25-30.037(2)(g), Florida Administrative Code, including notice to the customers of the system being transferred. No objections to the application have been received and the time for filing such has expired.

The Commission staff contacted the Department of Environmental Protection (DEP) concerning Meadow Wood's status. According to DEP there are no outstanding notices of violation or consent orders against the system.

According to the information provided by Ms. McKeever, she has been involved in the utility's daily operation for many years. Ms. McKeever has, however, retained the services of a licensed operator to take care of the utility. In addition, Ms. McKeever indicated that the utility has no liabilities, is in satisfactory condition, and is in compliance with DEP standards. Because Meadow Wood is a small system, it should only require modest technical and financial support.

Based on the foregoing, we find that the transfer of Meadow Wood from Mr. Richard Instine to Wanda McKeever is in the public interest and it is approved. Accordingly, Certificate No. 545-W, held by Meadow Wood, shall be reissued to reflect the change in ownership. The territory Meadow Wood is authorized to serve is shown on Attachment A of this Order, which by reference is incorporated herein.

Request for Waiver of Filing Fee

As mentioned previously, Ms. McKeever has asked that we waive payment of the \$750 filing fee in this proceeding due to the circumstances involved in the transfer. Meadow Wood was transferred to Ms. McKeever just prior to the death of the previous owner. Section 367.071(3), Florida Statutes, states, in part, "An application for proposed sale, assignment, or transfer shall be accompanied by a fee." (emphasis added) Although the circumstances in this transfer are unusual, we find that we do not have the statutory authority to waive Section 367.071(3), Florida Statutes.

Section 120.542, Florida Statutes, states, in part, "Agencies are authorized to grant variances and waivers to requirements of their rules . . . This section does not authorize agencies to grant variances or waivers to statutes." Therefore, because the filing fee is required by statute, it cannot be waived.

This is consistent with previous Commission decisions. See, Order No. PSC-97-0522-FOF-TI, issued May 7, 1997, in Docket No. 961143-TI (In Re: Request for Waiver of Penalty Related to Late Payment of Regulatory Assessment Fees, by Excel Telecommunications, Inc.), wherein the Commission found that neither the Florida Statutes nor the Commission Rules provide the Commission with the discretion to waive statutorily required fees, penalties and interest. See also Order No. PSC-94-1235-FOF-WS, issued October 11, 1994, in Docket No. 940743-WS (In Re: Joint Application for Transfer of Majority Organizational Control of Jacksonville Suburban Utilities Corporation in Duval County from MWC Corporation to United Water Resources, Inc.) wherein the Commission found that it lacks the authority to waive or temporarily exempt utilities from compliance with statutory law.

In In re: Petition for waiver of penalty for late payment of regulatory assessment fees pursuant to Rule 25-7.0131, Florida Administrative Code, by City Gas Company of Florida, Order No. PSC-97-0767-FOF-FU, Docket No. 970360-GU, June 30, 1997, the Commission discussed its lack of authority to waive the statutory penalty and interest assessments on late regulatory assessment fee payments.

Constitutional law requires that only the legislature can repeal, amend or modify an unambiguous statute. The principle of separation of powers of government in the Florida Constitution, which divides powers among the

legislative, executive and judicial branches, confines each branch to its own proper function and prohibits encroachment by one branch of government upon another. The right to pass statutes includes the power to repeal or modify them, provided no right secured by constitutional provisions is thereby violated. Ponder v. Graham, 4 Fla. 23 (Fla. 1951). It is the function of the legislature and not the courts or administrative agencies to change the law. 1 Fla. Jur. 2d, Administrative Law, Section 32. The grant of a waiver of the regulatory assessment fee penalty statute, in the absence of any waiver provisions, express or implied, contained in the statute, would be a modification of the statute. This is a function reserved solely for the legislature. In addition, there is no basis for interpretation of Section 350.113(4), Florida Statutes. The statute is clear and unambiguous on its face. If the terms and provisions of a statute are plain, there is no room for administrative interpretation. Southeastern Utilities service Co. v. Redding, 131 So.2d 1 (Fla. 1950).

It should also be noted that even in uncomplicated proceedings, costs are incurred by the Commission which are offset by the filing fee. Therefore, based on the foregoing, we find it appropriate to deny Ms. McKeever's request for waiver of the filing fee required by Section 367.071(3), Florida Statutes.

Rate Base

Pursuant to Section 367.071, Florida Statutes, the Commission may establish rate base for a utility that is being transferred. In this proceeding, the transfer is a result of a bequest to Ms. McKeever by Mr. Instine.

Rate base was not established when the original certificate was granted in 1992. At that time, the system was about 20 years old and had been operated by Mr. Instine for 10 years. The annual reports do not reveal the investment amount since the balance sheet information was omitted. Therefore, an engineer's assessment of original cost will be needed to determine rate base. In addition, due to the circumstances of the transfer, no money is involved (purchase price) in the transfer, and an acquisition adjustment is not an issue. Therefore, we do not find it appropriate to establish rate base at this time.

Rates and Charges

Meadow Wood's current rates and charges became effective on October 5, 1992, pursuant to order No. PSC-92-1114-FOF-WU, issued in Docket No. 920674-WU. Rule 25-9.044, Florida Administrative Code, requires the new owner of a system to adopt and use the rates, classification and regulations of the former owner unless authorized to change by the Commission.

Ms. McKeever has not requested to change the rates and we see no reason to change them at this time. Ms. McKeever shall continue to charge the rates and charges approved in Meadow Wood's tariff until authorized to change by the Commission in a subsequent proceeding. Meadow Wood has filed tariff sheets reflecting the change in ownership. The tariff sheet shall be effective for service provided and connections made on or after the stamped approval date on the tariff sheets.

It is, therefore,

ORDERED by the Florida Public Service Commission that the transfer of Meadow Wood, 1820 North Cherry Terrace, Crystal River, Florida 34429, from Mr. Richard Instine to Ms. Wanda McKeever is hereby approved. It is further

ORDERED that Ms. McKeever's request that the filing fee be waived is hereby denied. It is further

ORDERED that Ms. McKeever shall continue to charge the rates and charges approved in Meadow Wood's tariff until authorized to change by this Commission in a subsequent proceeding. The tariff shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets. It is further

ORDERED that Docket No. 970758-WU is hereby closed.

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By ORDER of the Florida Public Service Commission, this 5th
day of January, 1998.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy
of the order may be obtained by calling
1-850-413-6770.

(S E A L)

ALC

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

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or

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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 after the issuance 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.