

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: May 3, 2019
TO: Adam J. Teitzman, Commission Clerk, Office of Commission Clerk
FROM: Samantha Cibula, Office of the General Counsel *SMC.*
RE: Docket No. 20000154-SU

Please file the attached materials in the docket file listed above.

Thank you.

Attachment

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COMMISSION
CLERK



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FLORIDA PUBLIC SERVICE COM. /
DIVISION OF APPEALS

May 21, 1998

Via Federal Express

Florida Public Service Commission
Division of Appeals
Attn: Christiana T. Moore
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

RE: Proposed Rule Development
Flow Data to be Used for Wastewater Treatment Plant
Used and Useful Calculations

Dear Ms. Moore:

Florida Water Services Corporation ("Florida Water") requests a rule development workshop with regards to the above matter as published in Volume 24, Number 18, of Florida Administrative Weekly. A workshop on the proposed rule is necessary because the proposal, if approved, is contrary to engineering requirements and principles and will not allow utilities to earn a fair return on their investment. Pursuant to Section 120.54(2)(c), Florida Statutes, Florida Water requires that persons responsible for preparing the proposed rule be available to explain the proposal and to answer questions.

Very truly yours,

A handwritten signature in black ink that reads "Matthew J. Feil". The signature is written in a cursive style with a large, stylized "F" at the end.

Matthew J. Feil
Staff Attorney

GATLIN, SCHIEFELBEIN & COWDERY, P.A.

Attorneys at Law

3301 Thomasville Road, Suite 300
Tallahassee, Florida 32312

B. KENNETH GATLIN
WAYNE L. SCHIEFELBEIN
KATHRYN G.W. COWDERY

TELEPHONE (850) 385-9996
TELECOPIER (850) 385-6755
E-MAIL: bkgatlin@nettally.com

OF COUNSEL
THOMAS F. WOODS

May 19, 1998

Florida Public Service Commission
Division of Appeals
Attn: Christiana T. Moore
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

HAND DELIVERY

RE: Proposed Rule Development
Flow Data to be Used for Wastewater Treatment Plant
Used and Useful Calculations

Dear Ms. Moore:

Florida Waterworks Association requests a rule development workshop with regards to the above matter as published in Volume 24, Number 18 of Florida Administrative Weekly.

Very truly yours,



Wayne L. Schiefelbein

WLS/cas

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STATE OF FLORIDA

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OFFICE OF THE GENERAL COUNSEL
HAROLD A. MCLEAN
GENERAL COUNSEL
(850) 413-6199

Public Service Commission

October 16, 2002

Mr. John Rosner
Joint Administrative Procedures Committee
Room 120, Holland Building
Tallahassee, Florida 32399-1300

Re: Rule 25-30.432

Dear Mr. Rosner:

I had written to you on September 19, 2002, about possible changes to the above rule to respond to your objection. At that time, we decided to postpone adopting the rule in order to accommodate review by the committee, thereby tolling the period for filing it. I spoke to Jesslyn Krouskroup on October 14, 2002, to confirm this in your absence. I did not receive your response to the suggested rule change until Tuesday, October 15, 2002, as you can see from the attached copy, although it was dated September 24, 2002. The next scheduled agenda conference or public hearing at which the Commission can approve the change to the rule to remedy your objection is not until November 5, 2002. Therefore, the rule will not be filed within 90 days of the date of the original notice of rulemaking, but will be filed within the time authorized under the applicable exception.

Sincerely,

A handwritten signature in cursive script that reads "Christiana T. Moore".

Christiana T. Moore
Associate General Counsel

JOHN M. McKAY
President



THE FLORIDA LEGISLATURE
**JOINT ADMINISTRATIVE
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Speaker



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Senator Betty S. Holzendorf, Alternating Chair
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Representative Wilbert "Tee" Holloway

CARROLL WEBB, EXECUTIVE DIRECTOR
AND GENERAL COUNSEL
Room 120, Holland Building
Tallahassee, Florida 32399-1300
Telephone (850) 488-9110

Memorandum

TO: Christiana T. Moore
FROM: John Rosner *JR*
DATE: September 24, 2002
SUBJECT: Public Service Commission Rule 25-30.432

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GENERAL COUNSEL

Thank you for your letter dated September 19, 2002, and the attached rule amendment. I have carefully reviewed the document. In my judgment, the proposed language addresses the issue raised in my previous correspondence.

JOHN M. McKAY
President



THOMAS FEENEY
Speaker



THE FLORIDA LEGISLATURE
**JOINT ADMINISTRATIVE
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CARROLL WEBB, EXECUTIVE DIRECTOR
AND GENERAL COUNSEL
Room 120, Holland Building
Tallahassee, Florida 32399-1300
Telephone (850) 488-9110

October 8, 2002

Ms. Christiana T. Moore
Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RE: Public Service Commission Rule 25-30.432

Dear Ms. Moore:

According to our records, the above-styled rule was noticed in the Florida Administrative Weekly on **July 26, 2002**.

Paragraph 120.54(3)(e), F.S., requires that rules be filed for adoption not more than 90 days from the date of the original notice unless specified circumstances prevail. The 90-day period for filing the rule expires on **October 24, 2002**.

If you intend to adopt the rule, we remind you that paragraph 120.54(3)(d) F.S., requires that if the rules have not been changed since they were filed with the Committee, or if they contain only technical changes, you must file a notice to that effect with this Committee at least 7 days prior to filing the rules for adoption. If any change has been made in the rules, other than a technical change, you must publish a notice, and file a copy with the committee, at least 21 days prior to filing the rules for adoption.

If the rules are not filed within 90 days, and if an exception is not applicable, you must notice withdrawal of the rules.

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GENERAL COUNSEL

Ms. Christiana T. Moore
October 8, 2002
Page 2

Any further action to adopt the rules must comply with the rulemaking procedures of s. 120.54, F.S. Please advise us of any exceptions which apply to the rule so that we may keep our records current.

Sincerely,



Carroll Webb
Executive Director
and General Counsel

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STATE OF FLORIDA

COMMISSIONERS:
LILA A. JABER, CHAIRMAN
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OFFICE OF THE GENERAL COUNSEL
HAROLD A. MCLEAN
GENERAL COUNSEL
(850) 413-6199

Public Service Commission

September 19, 2002

Mr. John Rosner
Joint Administrative Procedures Committee
Room 120, Holland Building
Tallahassee, Florida 32399-1300

Re: Rule 25-30.432

Dear Mr. Rosner:

This letter is in response to your letter dated September 4, 2002, inquiring whether we intend to file the above rule as written. Commission staff is presently considering whether to recommend to the Commission that it modify the rule or withdraw it entirely. One option is to modify it as shown on the attached draft copy. If you agree that this version resolves your objection, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Christiana T. Moore".

Christiana T. Moore
Associate General Counsel

Enclosure

c: Marshall Willis

1 25-30.432 Wastewater Treatment Plant Used and Useful

2 **Calculations.** The flow data to be used in the numerator of the
3 equation for calculating the used and useful percentage of a
4 wastewater treatment plant shall be the same period or basis
5 (such as annual average daily flow, three-month average daily
6 flow, maximum month average daily flow) as the period or basis
7 stated for the permitted capacity on the most recent operating
8 permit issued by the Florida Department of Environmental
9 Protection (DEP). The DEP permitted capacity shall be used in
10 the denominator of the equation. ~~If there are differences~~
11 ~~between the capacities of the individual components of the~~
12 ~~wastewater treatment plant, the Commission may calculate a used~~
13 ~~and useful percentage for each individual component of the~~
14 ~~treatment plant using the actual capacity of the component in the~~
15 ~~denominator.~~ In determining the used and useful amount, the
16 Commission will also consider other factors such as the allowance
17 for growth pursuant to section 367.081(2)(a)2., F.S.,
18 infiltration and inflow, the extent to which the area served by
19 the plant is built out, whether the permitted capacity differs
20 from the design capacity, whether there are differences between
21 the actual capacities of the individual components of the
22 wastewater treatment plant and the permitted capacity of the
23 plant, and whether flows have decreased due to conservation or a
24 reduction in the number of customers. This rule does not apply
25 to reuse projects pursuant to section 367.0817(3), F.S , or

CODING: Words underlined are additions; words in ~~struck~~
through type are deletions from existing law.

1 investment for environmental compliance pursuant to section
2 367.081(2)(a)2.c., F.S.

3 Specific Authority: 350.127(2), 367.121(1)(f), FS.

4 Law Implemented: 367.081(2), FS.

5 History: New .

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CODING: Words underlined are additions; words in ~~struck~~
through type are deletions from existing law.

JOHN M. McKAY
President



THOMAS FEENEY
Speaker



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CARROLL WEBB, EXECUTIVE DIRECTOR
AND GENERAL COUNSEL
Room 120, Holland Building
Tallahassee, Florida 32399-1300
Telephone (850) 488-9110

September 4, 2002

Ms. Christiana T. Moore
Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

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02 SEP -5 PM 2:17
FLA PUBLIC SERVICE COMM.
OFFICE OF THE
GENERAL COUNSEL

Re: Public Service Commission Rule 25-30.432

Dear Ms. Moore:

Thank you for providing reference to the Florida Waterworks case. I carefully read the opinion and conclude that it does not cure the infirmity in rule 25-30.432. Unlike the rule in Florida Waterworks, the rule under consideration articulates no criteria. Rather, it is your letter dated August 21, 2002 which contains examples of criteria.

Please be assured that this issue is not new or unique. Since its inception, the Committee has consistently voted objections in instances where an agency asserts that it "may" take some action without providing standards or criteria to apprise the reader of its decisional process.

Please let me know if you still intend to file the rule as written.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Rosner".

John Rosner
Chief Attorney

Cc: Mr. Harold A. McLean, General Counsel

JOHN M. McKAY
President



Representative Donna Clarke, Chair
Senator Betty S. Holzendorf, Alternating Chair
Senator Bill Posey
Senator Ken Pruitt
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Representative Wilbert "Tee" Holloway

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Speaker



THE FLORIDA LEGISLATURE
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CARROLL WEBB, EXECUTIVE DIRECTOR
AND GENERAL COUNSEL
Room 120, Holland Building
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Telephone (850) 488-9110

August 28, 2002

Ms. Christiana T. Moore
Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Public Service Commission Rule 25-30.432

Dear Ms. Moore:

As you may know, I have been assigned to review the Commission's rules. This is to acknowledge your letter dated August 21 which was in response to Matt Sirman's letter of August 8, 2002. In my judgment, the rule remains objectionable pursuant to the provisions of section 120.52(8)(d), F.S.

The rule provides in pertinent part that the Commission *may* calculate a certain percentage for individual components of a treatment plant as described therein. However, no standards or criteria are disclosed to apprise the reader of whether or not the Commission will make such calculation under any circumstances. This renders the rule objectionable. See section 120.52(8)(d), F.S., which defines an invalid exercise of delegated legislative authority where a rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.

In your letter, you state that the factors applied by the Commission in deciding whether used and useful is calculated for individual components include whether certain data is available, whether such data as applied will not make a material difference in the used and useful amount and customer rates, as well as other factors. It would appear that these matters are "agency statements of general applicability" and fall under the definition of a rule in section 120.52(15), F.S. In fact, they appear to be the very criteria applied by the Commission in making the determination under discussion. The rule should be amended to encompass such factors as well as any others to be applied in the decision making process.

Ms. Christiana T. Moore
August 28, 2002
Page 2

I respectfully disagree with your analysis that the terms "may" or "is authorized to" are meant to provide information. Rather, unless those terms are supported by criteria to illustrate the agency's decisional analysis, the terms serve only to obfuscate the issue. A reader is left to guess as to how the agency will proceed. In this case, there is nothing to indicate that the Commission will or will not apply the factors described in your letter. Compare, City of Miami v. Save Brickell Ave. Inc., 426 So. 2d 1100 (Fla. 3 DCA 1983).

I must also disagree with your statement that it is the statute rather than the rule that vests the Commission with discretion. While a statute may vest an agency with discretion, it is through rulemaking that the agency implements or interprets the grant of rulemaking authority authorized by statute. A rule which contains no standards for agency decisions or vests unbridled discretion in the agency, such as the provision under consideration herein, is an invalid exercise of delegated legislative authority. By saying that the Commission *may* make a calculation, the Commission has arrogated to itself the unbridled discretion of making, or not making, the calculation based upon an unascertainable basis. See, Barrow v. Holland, 125 So. 2d 749 (Fla. 1960).

I note that the rule provides that it does not apply to reuse projects pursuant to section 367.0817(3), F.S. If not, please explain why that section is cited as law implemented.

Finally, your letter of no change was received in this office on August 27, 2002. Section 120.54(3)(d)1., F.S., mandates a seven day waiting period following receipt of such letter by this Committee before rules can be filed.

In light of the foregoing comments, please let me know if you still intend to file the rule in its present state.

Sincerely,



John Rosner
Chief Attorney

STATE OF FLORIDA

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OFFICE OF THE GENERAL COUNSEL
HAROLD A. MCLEAN
GENERAL COUNSEL
(850) 413-6199

Public Service Commission

August 21, 2002

Mr. Matthew Sirmans
Chief Attorney
Joint Administrative Procedures Committee
Room 120, Holland Building
Tallahassee, FL 32399-1300

Re: Rule 25-30.432, Wastewater Treatment Plant Used and Useful Calculations

Dear Mr. Sirmans:

This letter is in response to your letter dated August 8, 2002, regarding the above rule. You have asked under what circumstances would the Commission calculate a used and useful percentage for each individual component of the treatment plant and whether there is a situation whereby the Commission would not use the actual capacity in the calculation. The particular language that you question is:

If there are differences between the capacities of the individual components of the wastewater treatment plant, the Commission may calculate a used and useful percentage for each individual component of the treatment plant using the actual capacity of the component in the denominator.

You state in your letter that the language in the proposed rule appears to be contrary to the explanation found in the Statement of Facts and Circumstances Justifying the Rule, however, I believe that you may be comparing the wrong part of the explanation in the Statement to the above rule provision. The statement that "[t]he Commission will consider any difference in design and permitted capacity in determining the used and useful amount" is intended to address the rule provision listing the factors the Commission will consider which includes "whether the permitted capacity differs from the design capacity" among others. That is meant to address the situation where the DEP permitted capacity differs from the design capacity.

The rule provision quoted above, which is at issue here, is explained as follows in the Statement of Facts and Circumstances Justifying the Rule:

Mr. Matthew Sirmans
August 21, 2002
Page -2-

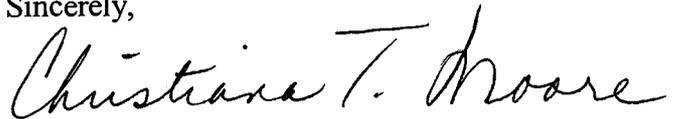
Rule 25-30.432 also provides for cases where the capacity of a plant is limited by an individual component. E.g., In re: Application for approval of staff-assisted rate case in Martin County by Laniger Enterprises, Order No. PSC-01-1574-PAA-WS issued July 30, 2001, in Docket No. 000584-WS. In such cases, the rule authorizes the Commission to calculate a used and useful percentage for each individual component of the treatment plant using the actual capacity of the component in the denominator.

The term "may" in this case means "is authorized to" and is meant only to provide information to those affected by the rule and other interested persons, and notify them that this is an action the Commission can take. Whether used and useful is calculated for each individual component will generally depend initially on whether, in a particular case, the capacity data is available by component. If the data is available, it still might not be practical to calculate used and useful for each individual component because, for instance, in the judgment of the Commissioners, the evidence in the particular case shows that calculating it one way or another makes no material difference in the used and useful amount and the customer rates. On the other hand, for example, in a given wastewater treatment system, the treatment plant may have a significantly greater capacity than the effluent disposal system, and the flows show that the effluent disposal system is 100 percent used and useful while the wastewater treatment plant--calculated separately--is only 50 percent used and useful. Although the entire system can only treat and dispose of the amount its smallest component can process, it would be unfair for customers to pay rates on an amount that was calculated as if the treatment plant is also 100 percent used and useful, unless, for instance, there is evidence that the utility could not have installed a smaller (and less costly) treatment plant.

In addition, it is the ratemaking statute--section 367.081(2)--rather than the rule that vests the discretion in the Commission to determine what portion of each utility's property is used and useful in the public service. Even though the Commission endeavors to codify its policies by rule, it still often must resort to case-by-case resolution to ensure fair and compensatory rates under section 367.081, Florida Statutes.

I hope this response satisfactorily addresses your concerns. Please do not hesitate to call me if you have questions.

Sincerely,



Christiana T. Moore
Senior Attorney

JOHN M. McKAY
President



THOMAS FEENEY
Speaker



THE FLORIDA LEGISLATURE
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CARROLL WEBB, EXECUTIVE DIRECTOR
AND GENERAL COUNSEL
Room 120, Holland Building
Tallahassee, Florida 32399-1300
Telephone (850) 488-9110

August 8, 2002

Ms. Christina T. Moore, Senior Attorney
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Fl 32399-0850

Re: 25-30.432

Dear Ms. Moore:

Please allow this to acknowledge receipt of the above-referenced rule, which was published in the July 26, 2002, edition of the Florida Administrative Weekly. I have completed my initial review and have the following comment:

25-30.432.1. This rule states in part:

If there are differences between the capacities of the individual components of the wastewater treatment plant, the Commission may calculate a used and useful percentage for each individual component of the treatment plant using the actual capacity of the component in the denominator.

Under what circumstances would the Commission use this calculation? Is there a situation whereby the Commission wouldn't use the actual capacity in the calculation? By using the verb *may*, the rule implies that the Commission *may not* use the actual capacity in the equation. Under Section 120.52(8)(d), F.S. it states in part, that a proposed rule is an invalid exercise of delegated legislative authority if the rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency. By stating that the Commission may calculate the equation in this manner, the rule vests the Commission with unbridled discretion whether to use the actual capacity in the calculation.

Moreover, in the Statement of Facts and Circumstances Justifying the Rule, it states, "The recommended rule provides that the Commission will consider any differences in design and permitted capacity in determining the used and useful amount." (Emphasis added) The language in the proposed rule is contrary to the explanation found in the Statement. The Statement suggests that if the conditions exist, then the Commission shall take them into account. However,

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GENERAL COUNSEL.

Ms. Christina T. Moore

August 8, 2002

Page 2

the language of the proposed rule suggests that the Commission might take the conditions into account, but without elaborating under what circumstances or criteria would have to exist in order for the Commission to take them into account. If the Commission is going to consider any differences, then the language in the proposed rule should reflect this decision as elaborated in the Statement.

Please advise what the Commission's intent is with regard to this rule.

Sincerely yours,



Matthew Sirmans
Chief Attorney

#128284

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