

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for a rate increase for North Ft. Myers Division in Lee County by Florida Cities Water Company - Lee County Division.

DOCKET NO. 950387-SU
ORDER NO. PSC-01-0945-FOF-SU
ISSUED: April 16, 2001

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO APPROVE
REFUND METHODOLOGY, MODIFYING ORDER NO. PSC-99-0691-FOF-SU AND
SETTING FORTH REFUND REQUIREMENTS

BY THE COMMISSION:

BACKGROUND

Florida Cities Water Company (FCWC or utility) filed an application for a rate increase on May 19, 1995, in this docket, for its North Ft. Myers Division in Lee County. The utility requested that the case be processed using the Proposed Agency Action (PAA) procedure. By PAA Order No. PSC-95-1360-FOF-SU, issued November 2, 1995, we proposed to grant a rate increase for this system. However, several customers filed timely objections to the PAA order and the case was set for hearing.

On December 1, 1995, FCWC implemented the PAA rates on an interim basis subject to refund and posted a corporate undertaking pursuant to Order No. PSC-96-0038-FOF-SU, issued January 10, 1996. Those rates were effective on December 13, 1995. A hearing was held on April 24-25, 1996, in the Lee County service area. By Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, we approved final rates which would have resulted in a rate reduction and a refund of the PAA implemented interim rates.

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However, FCWC appealed Order No. PSC-96-1133-FOF-SU on October 7, 1996, and on January 12, 1998, the First District Court of Appeal (DCA) reversed and remanded the Order for further proceedings. Florida Cities Water Co. v. FPSC, 705 So. 2d 620 (Fla. 1st DCA 1998). By Order No. PSC-98-0762-PCO-SU, issued June 6, 1998, we increased FCWC's corporate undertaking to cover the amount subject to refund that was accruing during this time.

A remand hearing was held in the Lee County service area on December 8-9, 1998. By Order No. PSC-99-0691-FOF-SU (Final Order on Remand), issued on April 8, 1999, we established final rates which were higher than the original rates but lower than the PAA rates that the utility implemented subject to refund. In that Order, we also ordered FCWC to refund with interest the difference between the PAA implemented rates and the final rates.

On April 15, 1999, one week after issuance of the Final Order on Remand, FCWC and its affiliate, Poinciana Utilities, Inc. (PUI) filed a joint application to transfer all of its water and wastewater facilities to the Florida Governmental Utility Authority (GUA), except for the facilities serving the Town of Ft. Myers Beach. The GUA is a governmental entity that is exempt from our regulation. That transfer was finalized on April 15, 1999. On October 4, 2000, FCWC and PUI amended their transfer application to include the facilities serving the Town of Fort Myers Beach (Town). The transfer of facilities was approved by Order No. PSC-00-2351-FOF-WS, issued December 7, 2000, in Docket No. 990489-WS.

In the order approving the transfer, we noted that the instant wastewater rate case docket for North Ft. Myers was still open and that the utility had been directed to make refunds pursuant to the Final Order on Remand. Therefore, we kept the transfer docket open and did not cancel the certificates for this utility pending the final outcome in this docket.

We lost regulatory authority over the prospective rates of this utility as of April 15, 1999, the date of the transfer to GUA. However, pursuant to the rationale in Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995), we believe we have continuing jurisdiction to conclude this rate case and the overcollection of revenues. Moreover, pursuant to the "Utility System Asset Acquisition Agreement, by and between Florida

Governmental Utility Authority and Florida Cities Water Company and Poinciana Utilities, Inc." (Utility System Asset Acquisition Agreement) entered into on April 1, 1999, the signatories specifically noted in Section 4.10, page 28, that to the extent there were any regulatory rate proceedings pending before this Commission, all financial responsibility or liability for any rate relief, refund or other obligations imposed by this Commission shall remain with FCWC and shall expressly not be assumed by the GUA.

The remaining issues pertaining to this rate case are the completion of the refund, verification that the refunds have been completed, the treatment of unclaimed refunds and the subsequent release or termination of FCWC's corporate undertaking.

The Final Order on Remand required the refunds to be made with interest, calculated pursuant to Rule 25-30.360(4), Florida Administrative Code. Moreover, pursuant to Rule 25-30.360(2), Florida Administrative Code, all refunds should have been made within 90 days of the date of that Order. However, with the appeal of that Order, the effective date of the Final Order on Remand is the date of the DCA's December 22, 2000, mandate. The Final Order on Remand also required FCWC to submit refund reports and treat any unclaimed refunds as contributions-in-aid-of-construction (CIAC) pursuant to Rules 25-30.360(7) and (8), Florida Administrative Code.

On February, 14, 2001, FCWC filed a Motion to Approve Refund Methodology (Motion) pursuant to Rule 28-106.204, Florida Administrative Code. By separate document filed that same date, FCWC requested oral argument on the Motion. We granted this request and heard oral argument on April 3, 2001. On that same date, we set forth the refund requirements to be followed by FCWC.

We have jurisdiction pursuant to Sections 367.011(2), 367.081, 367.082, and 367.171(5), Florida Statutes.

MOTION TO APPROVE REFUND METHODOLOGY AND REFUND REQUIREMENTS

In its Motion, FCWC notes that there is an apparent inconsistency between the Final Order on Remand and Rule 25-

30.360(3), Florida Administrative Code. Rule 25-30.360(3), Florida Administrative Code, states:

Basis of Refund. Where the refund is the result of a specific rate change, including interim rate increases, and the refund can be computed on a per customer basis, that will be the basis of the refund. However, where the refund is not related to specific rate changes, such as a refund for overearnings, the refund shall be made to customers of record as of a date specified by the Commission. In such case, refunds shall be made on the basis of usage. Per customer refund refers to a refund to every customer receiving service during the refund period. Customer of record refund refers to a refund to every customer receiving service as of a date specified by the Commission.

The utility argues that the Final Order on Remand is inconsistent with the rule. The Final Order on Remand refers to Rule 25-30.360(3), Florida Administrative Code, but then states that refunds shall be made to customers of record as of April 8, 1999. FCWC notes that the refund is the result of a specific rate change, and states that the refund can be completed on a per customer basis. Therefore, although it could comply with the language in the Order, FCWC believes that a refund on a per customer basis would be in the best interest of the customers and in conformance with the rule. FCWC proposes to compute the refund on a per customer basis so that all customers who had received service during the time period in which the PAA rates were in effect would receive refunds. We agree with FCWC that the Final Order on Remand is inconsistent with our rule. Refunds shall be made to the customers who paid the PAA rates, and not only to the customers of record as of April 8, 1999, the issuance date of the Final Order on Remand.

Additionally, FCWC requests the refunds be computed based upon the amounts billed to the customers during the refund period multiplied by 10.6%. The 10.6% multiplier represents a weighted average of the 10.92% and 10.5% percentages as set forth in the Final Order on Remand. The Order states that the utility shall be required to refund 10.92% of revenues collected from January 1, 1996, to December 31, 1996. From January 1, 1997, to the effective

date of the final rates, 10.50% of revenues collected shall be refunded. The Final Order on Remand specifically addressed the refund percentages for each period and FCWC has not shown any reason why this decision was wrong, unduly burdensome, or otherwise inherently unfair such that it should be changed. Therefore, the utility's request to compute the refunds based upon the amounts billed to the customers during the refund period multiplied by 10.6% is denied.

FCWC states in its Motion that of the approximately 4,100 total customers that paid the PAA rates, approximately 1,500 have left the system, leaving approximately 2,600 customers as of April 8, 1999, the issuance date of the Final Order on Remand. Since many of these 1,500 customers left the system more than two years ago, mail would not be forwarded to their new addresses. Any refund checks mailed to these customers would be ineffective and would be returned to FCWC with no forwarding address.

FCWC proposes that refund checks be issued and mailed only to the customers of record on April 8, 1999. We note that the postal service will only deliver to a forwarding address for one year after a person has submitted the card for forwarding. However, the postal service will return the letter to the sender and advise the sender of the last known forwarding address for up to 18 months. Therefore, even 18 months after someone has moved, there is a benefit to mailing the letter to the last known address.

In addition, FCWC proposes that it publish a newspaper notice to inform the remaining 1,500 prior customers of the refund. The utility proposes that those who reply within 60 days of the date of publication and provide a current address will be issued and mailed refund checks. Checks will not be issued to prior customers who do not respond and for whom FCWC will therefore have no current mailing address.

Clearly, the utility must send refund checks to customers that are still on the system now owned by the GUA. Moreover, we find that refund checks shall be mailed to the last known address of customers due a refund that were on the system as of November 13, 1999, which is approximately 18 months prior to the date that we are requiring refund checks be mailed to the customers due a refund. The utility shall complete the initial mailing of the

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refund checks to customers within 30 days of the issuance date of this Order.

The utility also proposes to publish only one newspaper notice. However, we note that the refund period for this case spans more than five years. Therefore, in order to make a more reasonable attempt to find customers that have left the system, the utility shall publish notice in a newspaper of general circulation in the utility's service area once per week for one month. The noticing requirements shall be completed within 45 days of the issuance date of this Order. Checks shall be issued to former customers that respond to the noticing requirements within 10 days of receiving verification that the customer is entitled to a refund.

FCWC has proposed and we agree that interest shall be calculated pursuant to Rule 25-30.360(4), Florida Administrative Code, and that refund reports shall be submitted pursuant to the requirements of Rule 25-30.360(7), Florida Administrative Code.

FCWC also proposes that we allow the utility to treat any unclaimed refunds as CIAC. As required by both the Final Order on Remand and Rule 25-30.360(8), Florida Administrative Code, FCWC claims that treatment of unclaimed refunds as CIAC is consistent with the Utility System Asset Acquisition Agreement, which contains the terms and conditions of the sale of the system. Pursuant to the terms of that Agreement, FCWC argues that any unclaimed refunds would remain the property of FCWC. This is based on the sections of the Agreement that state that any financial responsibility that may result from Docket No. 950387-SU remains with FCWC after the transfer.

Further, FCWC estimates that it will incur \$6 per customer in administrative costs in making the refund. FCWC requests that we allow it the ability to offset these costs against any unclaimed refund checks. According to FCWC, accounting for the unclaimed refunds should not be treated differently because of the sale.

We recognize that both the Final Order on Remand and Rule 25-30.360(8), Florida Administrative Code, state that any unclaimed refunds are to be treated as CIAC. Nevertheless, circumstances have changed since the Final Order on Remand. When we issued that

Order, the utility was still in existence and providing service to customers. Therefore, crediting the unclaimed refunds to the CIAC account would have reduced the utility's rate base and benefitted the general body of ratepayers. We find that both the Final Order on Remand and the Rule contemplate that the utility would be in existence after the unclaimed refunds have been addressed. We further find that the rule was drafted so that the customers of the utility would receive the maximum benefit of any refunds to include the unclaimed refunds. Moreover, Section 367.081(6), Florida Statutes, provides that we "shall provide by rule for the disposition of any funds not refunded, but in no event shall such funds accrue to the benefit of the utility." However, with the subsequent sale of the utility, and under the terms of the sale agreement, any funds deposited in the CIAC account would go directly to the shareholders and thus enure to the benefit of the utility.

We recognize that in Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966), the Florida Supreme Court found that:

[O]rders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

Nevertheless, the Court continued by stating that:

We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on their own motion, regulatory agencies such as the commission often do so. Further, whereas courts usually decide cases on relatively fixed principles of law for

the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.

Moreover, Rule 25-30.360(1), Florida Administrative Code, states in pertinent part that "all refunds ordered by the Commission shall be made in accordance with the provisions of this Rule, unless otherwise ordered by the Commission." The purpose of Rule 25-30.360(8), Florida Administrative Code, is to insure that, when the specific customer cannot be found, any unclaimed refunds will enure to the benefit of the general body of ratepayers. However, we find that with the sale of the utility to GUA, the purpose of the rule would not be achieved by allowing such treatment. With the sale of the utility to GUA, in effect, the utility is no longer in operation, and the CIAC account to which unclaimed refunds would be credited would be finally disbursed to the utility's parent company and would therefore enure to the benefit of the shareholders rather than to the general body of ratepayers. We believe that these changed circumstances fit squarely within those contemplated by the Peoples Gas Court. Due to the sale of the utility to GUA, the public interest would no longer be served by allowing the unclaimed refunds to be booked to cash CIAC, as previously ordered.

Based upon the changed circumstances involving the sale of the utility to GUA, and the two-year delay in the utility making the refunds caused by the appeal of the Final Order on Remand, we hereby recede from our decision made in the Final Order on Remand which required all unclaimed refunds to be treated as cash CIAC and the utility's request to treat any unclaimed refunds as cash CIAC is denied.

Based on the above, all unclaimed refunds after 180 days of the issuance date of this Order shall be remitted to the State of Florida Comptroller's Office. In this way, the former customers

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who have not yet been found may still be able to claim the refunds that were due to them. Moreover, the utility shall take all reasonable efforts as set forth above to search for the approximate one-third of the customers that have left the system. Upon completion of the refunds, FCWC shall file a final report as required by Rule 25-30.360(7), Florida Administrative Code.

FCWC has proposed that we allow it to offset the administrative costs of the refund against any unclaimed refund checks. We have generally required that the maintenance and administrative costs associated with the refund be borne by the utility and not by the customers. See Order No. PSC-00-2500-PAA-WS, issued December 26, 2000, in Docket No. 000327-WS (consummated by Order No. PSC-01-0143-CO-WS, issued January 18, 2001). Therefore, FCWC's proposal to offset the administrative costs of the refund against any unclaimed refund checks is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Cities Water Company's Motion to Approve Refund Methodology shall be granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that Florida Cities Water Company shall complete the refunds as set forth in the body of this Order. It is further

ORDERED that Florida Cities Water Company shall make refunds to the customers who paid the proposed agency action rates and are due a refund, and not only to the customers of record as of April 8, 1999, the issuance date of the Final Order on Remand. It is further

ORDERED that Florida Cities Water Company's request to compute the refunds based upon the amounts billed to the customers during the refund period multiplied by 10.6% is denied. It is further

ORDERED that Florida Cities Water Company shall send refund checks to customers that are still on the system now owned by the Florida Governmental Utility Authority. Moreover, refund checks shall be mailed to the last known address of customers due a refund that were on the system as of November 13, 1999. It is further

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ORDERED that Florida Cities Water Company shall complete the initial mailing of the refund checks to customers within 30 days of the issuance date of this Order. It is further

ORDERED that Florida Cities Water Company shall publish notice in a newspaper of general circulation in the utility's service area once per week for one month. The noticing requirements shall be completed within 45 days of the issuance date of this Order. It is further

ORDERED that checks shall be issued to former customers that respond to the noticing requirements within 10 days of receiving verification that the customer is entitled to a refund. It is further

ORDERED that interest shall be calculated pursuant to Rule 25-30.360(4), Florida Administrative Code, and that refund reports shall be submitted pursuant to the requirements of Rule 25-30.360(7), Florida Administrative Code. It is further

ORDERED that Florida Cities Water Company's request to treat any unclaimed refunds as cash contributions-in-aid-of-construction is denied. We hereby recede from our decision made in the Final Order on Remand which required refunds be made to the customers of record as of April 8, 1999, and that unclaimed refunds be treated as cash contributions-in-aid-of-construction. Order No. PSC-99-0691-FOF-SU is affirmed in all other respects. It is further

ORDERED that Florida Cities Water Company shall take all reasonable efforts as set forth in the body of this Order to search for the approximate one-third of the customers that have left the system. Upon completion of the refunds, Florida Cities Water company shall file a final report as required by Rule 25-30.360, Florida Administrative Code. It is further

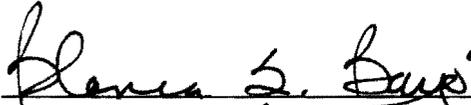
ORDERED that Florida Cities Water Company's proposal to offset the administrative costs of the refund against any unclaimed refund checks is denied. It is further

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ORDERED that Florida Cities Water Company shall submit all unclaimed refunds to the Office of the Comptroller, the Department of Banking and Finance, within 180 days of the date of this Order. It is further

ORDERED that this docket shall remain open in order for Florida Cities Water Company to complete the refund, and submit the refund reports, and for our staff to verify that the refund is complete and that any unclaimed refunds have been remitted to the State of Florida's Office of the Comptroller, Department of Banking and Finance, within 180 days of the date of this Order. This docket shall thereafter be administratively closed.

By ORDER of the Florida Public Service Commission this 16th day of April, 2001.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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 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 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.