

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Indianwood ) DOCKET NO. 941137-WS  
Development Corporation, Inc., ) ORDER NO. PSC-95-0045-FOF-WS  
against INDIANTOWN COMPANY, ) ISSUED: January 10, 1995  
INC., regarding certain refunds )  
and provision of service in )  
Martin County )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION

ORDER DENYING REQUEST FOR CIAC REFUND AND DENYING UTILITY'S  
REQUEST FOR A FINDING OF COMPLETE ABSENCE OF JUSTICIABLE ISSUE OF  
FACT OR LAW

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

Indiantown Company, Inc., (Indiantown or utility) is a Class B utility located in Martin County. According to Indiantown's 1993 Annual Report, it serves 1,660 water customers and 1,571 wastewater customers. In 1993, the water system had actual operating revenues of \$437,350 and a net operating income of \$40,667. The wastewater system had actual operating revenues of \$485,215 and a net operating income of \$56,726. The utility is located in the South Florida Water Management District, which has been designated a critical use area.

Indiantown has continuously had the authority to collect Federal income tax gross-up charges on contributions-in-aid-of-construction (CIAC) from March 29, 1991, to the present. The

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Commission initially authorized Indiantown to collect these charges on an interim basis subject to refund pending a final determination by Order No. 24303, issued March 29, 1991, in Docket No. 900835-WS. On July 15, 1991, the utility filed certain additional information which was required for the Commission to make a final determination on the CIAC gross-up charges. On November 20, 1991, the Commission granted the utility the authority to continue collecting gross-up of CIAC using the full gross-up method of calculation, by Order No. 25366, issued November 20, 1991, in Docket No. 900835-WS. Further evidence of the utility's continued authority to collect CIAC gross-up charges is found in Order No. PSC-94-0156-FOF-WS, issued February 9, 1994, in Docket No. 930914-WS. On page seven of that order, Indiantown is listed as number eleven of twenty-five companies with full gross-up authority. Also, on page six of Order No. PSC-94-1265-FOF-WS, issued October 12, 1994, in Docket No. 940661-WS, Indiantown is listed as number ten of twenty-two companies with full gross-up authority.

At issue here are the utility's tariff sheets which specifically reflect its authorized CIAC gross-up charges. These tariff sheets became effective on December 12, 1991, upon the expiration of the protest period to Order No. 25366. They were numbered first revised sheets nos. 34.0 and 35.0, for water, and first revised sheets nos. 31.0 and 32.0, for wastewater. However, on June 27, 1994, while conducting an inquiry into the utility's authorized CIAC gross-up charges, our staff determined these tariff sheets to be missing from the utility's tariffs.

On January 28, 1994, numerous other revised water and wastewater tariff sheets were approved to reflect a revised service availability policy pursuant to Order No. PSC-93-1732-FOF-WS, issued December 1, 1993, in Docket No. 930171-WS. In revising those other tariff sheets, the utility inadvertently removed the tariff sheets at issue here. Our staff did not take notice of the utility's filing error at or around the time it was made.

On July 8, 1994, shortly after determining the tariff sheets at issue to be missing, our staff notified the utility of same. By letter dated August 4, 1994, the utility notified our staff that the tariff sheets at issue were inadvertently supplanted by the tariff sheets for the revised service availability policy, and that there has never been any intent on the part of the utility to remove the approved gross-up of CIAC as part of its tariff. Further, the utility asserted that there has been no order or other action of the Commission or of Commission staff that was taken with the intention of eliminating the approved CIAC gross-up.

Along with the August 4, 1994, letter, and in order to correct the problem, the utility filed renumbered tariff sheets for its water and wastewater tariffs to make it clear that CIAC gross-up is an approved activity of the utility. On August 16, 1994, this Commission administratively approved the submitted renumbered tariff sheets. The following tariff sheets were approved effective August 17, 1994: third revised sheets nos. 31.0 and 32.0 for water, and third revised sheets nos. 28.0 and 29.0 for wastewater. In sum, the water and wastewater tariff sheets reflecting the approved CIAC gross-up charges for this utility were missing from the utility's tariffs from January 28, 1994, until August 17, 1994.

On October 28, 1994, Indianwood Development Corporation, Inc., (Indianwood) filed a Complaint pursuant to Rule 25-22.036(5), Florida Administrative Code, requesting this Commission to enter an order directing the utility to make certain refunds and to provide certain service connections, and requesting a hearing pursuant to Section 120.57(1), Florida Statutes, as necessary. Specifically, Indianwood requests that we order the utility to refund \$1,284.69, which sum represents CIAC gross-up charges paid by Indianwood, under protest, for water and wastewater service connections for three residential building lots. Indianwood further requests that we order the utility to provide water and wastewater service connections to forty-two other lots, for which Indianwood has not paid any CIAC gross-up charges to date. Indianwood asserts that the utility's tariffs did not authorize or provide for CIAC gross-up charges from January 28, 1994, through August 17, 1994, during which period Indianwood requested the utility to provide these service connections.

On November 10, 1994, Indiantown's Answer, Affirmative Defense, and Requested Finding to Indianwood's Complaint was received. Indiantown asserts that it has at all times from March 29, 1991, to the present, had lawful authority pursuant to orders of the Commission to collect CIAC gross-up charges. The utility requests that we enter a finding that there was a complete absence of a justiciable issue of either law or fact raised by Indianwood's complaint.

On November 23, 1994, Indianwood's Reply to the utility's Affirmative Defense and Requested Finding was received. Indianwood's Complaint, the utility's Answer, Affirmative Defense, and Requested Finding, and Indianwood's Reply are the subjects of this Order.

REQUEST FOR REFUND OF CIAC GROSS-UP CHARGES

In its Complaint, Indianwood states that in June and July, 1994, Indianwood requested the utility to provide water and wastewater service connections for three residential building lots (lots P-11, P-12, and S-13). By letter dated June 6, 1994, the utility informed Indianwood that the total connection charges for each connection was \$3,968.69, which sum included \$1,284.69 in CIAC gross-up charges. Indianwood paid, under protest, the full service connection charges for these three connections as requested by the utility.

Indianwood asserts that the utility's approved water and wastewater tariffs did not authorize or provide for the utility to charge or recover CIAC gross-up charges for new water or wastewater service connections during the period of January 28, 1994, through August 17, 1994. Indianwood argues that the utility therefore improperly charged Indianwood for CIAC gross-up in the amount of \$1,284.69 per lot for the three connections, which connections were requested during the time the CIAC gross-up tariff sheets were missing from the utility's tariffs.

Indianwood believes that Sections 367.081 and 367.091, Florida Statutes, and Rule 25-30.135, Florida Administrative Code, have been violated. Section 367.081, Florida Statutes, requires that a utility may only charge rates and charges which have been approved by this Commission. Section 367.091(2), Florida Statutes, requires that a utility's rates, charges, and customer service policies must be contained in an approved tariff. Finally, Rule 25-30.135, Florida Administrative Code, prohibits a utility from modifying or revising its rules or regulations or its schedules of rates and charges until the utility files and receives approval from this Commission. Indianwood believes that these statutory and rule provisions entitle it to the relief it requests. Indianwood requests that we order the utility to refund \$3,854.07 for the CIAC gross-up charges paid for service connection for the three lots, plus interest.

In its Affirmative Defense to Indianwood's complaint, the utility asserts that no intentional act or order of the Commission has revoked, rejected, or altered the utility's tariffs. The utility has never been given notice of intention to revoke any tariff, nor has it been given any opportunity to defend any action related to any tariff cancellation, removal, rejection, or alteration.

The utility's tariffs containing the gross-up of CIAC were replaced, through inadvertence, by the tariff sheets for the

utility's revised service availability policy on January 28, 1994. By letter dated August 4, 1994, the utility explains that:

Original Sheet No. 34.0 was approved in 1991 as part of the water tariff provisions covering the gross-up of CIAC, and in 1994, the same sheet number, Original Sheet 34.0 was approved as the beginning sheet for the Index for the Service Availability Policy. The same is true for Sheet No. 31.0 of the sewer tariff.

We find that no intentional act or order of the Commission has revoked, rejected, or altered the utility's tariffs. Furthermore, there has never been any intention by Commission staff to remove or replace the tariffs containing the gross-up of the CIAC. We have no reason to believe that the utility intended to remove the approved tariff sheets at issue. Pursuant to Commission orders, Indiantown has continuously had the authority to collect gross-up on CIAC from March 29, 1991, to the present. The utility has not been given any opportunity to defend any action related to any tariff cancellation, removal, rejection, or alteration.

A similar predicament occurred in the telecommunications industry, which culminated in a Florida Supreme Court opinion in the case of U.S. Sprint Communications Co. v. Nichols, 534 So. 2d 698 (Fla. 1988). As explained by that case, the Commission discovered an error in certain original tariff sheets which inadvertently applied a proration to trunk-side connections as well as to the authorized line-side connections. By Order No. 16687, issued October 6, 1986, in Docket No. 860881-TL, the Commission ordered the local exchange companies to correct the error and to conform their rates to reflect the rates approved by a prior Commission order. Id. at 699. The Court determined that "[t]he Commission's action was merely a directive ordering compliance with the access rates previously authorized.... The directive resulted in no substantive change from the policy the Commission originally voted to adopt." Id. at 699-700. The Court found that "[o]nce the error was discovered, the Commission had the power and the duty to order compliance with its original decision." Id. at 700.

In its Affirmative Defense, Indiantown further asserts that other tariff provisions which remained in the Service Availability Policy sections of the utility's tariffs continued to allow for the collection of gross-up on CIAC, "with the result that there have continuously been in existence since March 29, 1991, to date approved tariff provisions indicating that gross-up on CIAC, as authorized by Commission order, may be collected." In its Reply to the utility's Affirmative Defense, Indianwood states that the specific tariff sheets filed with the utility's most recent tariff



filing allow the utility to gross-up CIAC, but that those tariff sheets did not become effective until August 17, 1994.

We note that in the approved service availability portions of the utility's water and wastewater tariffs pertaining to CIAC for both on-site and off-site facilities, there appears a provision which requires that contributors shall be responsible for any federal income taxes due from the Service Company resulting from the payment for and/or the transfer of such on or off-site facilities to the Service Company. Indianwood has not alleged that any of the tariff sheets containing this provision were missing during the period of time in question. Because CIAC gross-up charges are the only federal income taxes charged to contributors, this tariff provision could reasonably have notified Indianwood of its responsibility for payment of those charges. At the least, this provision could have prompted Indianwood to make further inquiry into whether it would be required to pay any federal income taxes pursuant to its request for service.

We do not believe that Sections 367.081 and 367.091, Florida Statutes, nor Rule 25-30.135, Florida Administrative Code, have been violated because the tariff sheets at issue were inadvertently replaced and were never cancelled by an order. Therefore, we hereby deny Indianwood's request for an order requiring the utility to refund the CIAC gross-up charges for the service connections to the three lots at issue.

REQUEST FOR SERVICE CONNECTIONS FOR WHICH CIAC  
GROSS-UP CHARGES HAVE NOT BEEN PAID

In its Complaint, Indianwood further requests that we order the utility to immediately provide water and wastewater service connections to forty-two residential lots, without payment of any CIAC gross-up charges. Indianwood states that it requested these connections by letter to the utility on August 12, 1994. With the letter, Indianwood tendered \$112,728, as payment in full of all applicable service connection charges, except for any CIAC gross-up charges. Immediately thereafter, the utility informed Indianwood by telephone that it would not provide the requested connections without payment of the CIAC gross-up charges.

Our above discussion and findings with respect to Indianwood's request for a refund of CIAC gross-up charges is equally applicable here. As discussed above, we do not believe that Sections 367.081 and 367.091, Florida Statutes, nor Rule 25-30.135, Florida Administrative Code, have been violated because the tariff sheets at issue were inadvertently replaced and were never cancelled by an order. Therefore, we hereby deny Indianwood's request for an order

requiring the utility to immediately provide water and wastewater service connections to Indianwood's forty-two residential lots at issue. The utility shall not be required to provide service connections to these lots until correct payment of the authorized CIAC gross-up charges is received.

REQUEST FOR A FINDING OF COMPLETE ABSENCE  
OF JUSTICIABLE FACT OR LAW

Indiantown requests that we enter a finding that there was a complete absence of a justiciable issue of either fact or law raised by Indianwood's Complaint. In its Reply to this Requested Finding, Indianwood asserts that there are several justiciable issues of law and fact raised by its Complaint.

Indianwood asserts that the presence of these justiciable issues is demonstrated by our staff's correspondence to the utility dated July 7, 1994, notifying the utility that this Commission was missing the tariff sheets on the CIAC gross-up charges; and by the utility's letter of August 4, 1994, which states that the CIAC gross-up tariff sheets "were supplanted by the tariff sheets for the service availability policy." We agree that these are justiciable issues of fact. Whether the inadvertent removal of the tariff sheets extinguished the utility's authority to collect CIAC gross-up charges pursuant to orders of the Commission is a justiciable issue of law. This is evidenced by the decision of the Florida Supreme Court in U.S. Sprint Communications Co. v Nichols, 534 So.2d at 698. For these reasons, we hereby deny the utility's request for a finding of a complete absence of justiciable issue of fact or law.

If no timely protest is received to this Order, which we hereby issue as proposed agency action, no further action will be required and this docket shall be closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Indianwood Development Corporation, Inc.'s, request for a refund of CIAC gross-up charges paid, under protest, to Indiantown Company, Inc., is hereby denied, as set forth in the body of this Order. It is further

ORDERED that Indianwood Development Corporation, Inc.'s, request for immediate water and wastewater service connections to forty-two residential lots is hereby denied, as set forth in the body of this Order. Indiantown Company, Inc., shall not be required to provide service connections to these lots until correct

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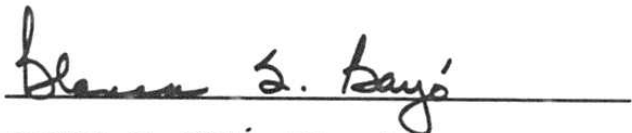
payment of the authorized CIAC gross-up charges is received. It is further

ORDERED that Indiantown Company, Inc.'s, request for a finding of complete absence of justiciable issue of fact or law is hereby denied. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that if no timely protest is received, no further action will be required and this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 10th day of January, 1995.



BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this Order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on January 31, 1995.

In the absence of such a petition, this Order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this Order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this Order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water 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 of the effective date 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.