BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Show cause proceedings against St. Johns North Utility Corp. in St. Johns County for violation of Chapter 367, F.S.	)	DOCKET NO. 881425-WS ORDER NO. 23410 ISSUED: 8-27-90

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
FRANK S. MESSERSMITH

Pursuant to notice, an administrative hearing was held before P. Michael Ruff, Hearing Officer with the Division of Administrative Hearings, on February 12, 1990, in St. Augustine, Florida, in the above-captioned matter.

APPEARANCES:

For Petitioner: David C. Schwartz, Esq.
Florida Public Service Commission
Legal Division
101 E. Gaines Street
Tallahassee, FL 32399-0850

For Respondent: Joseph E. Warren, Esq.
1930 San Marco Boulevard
Suite 200
Jacksonville, FL 32207

The Hearing Officer's Recommended Order was entered on June 14, 1990. No exceptions thereto were filed. After consideration of the evidence, we now enter our Order.

FINAL ORDER ASSESSING PENALTY

BY THE COMMISSION:

BACKGROUND

On February 17, 1989, the Commission issued Order No. 20762, requiring St. Johns North Utility Corp. (Utility) to show cause why it should not be fined up to $5,000 per day for

failure to comply with the provisions of Order No. 20409. That Order required the Utility to respond in writing to certain questions asked by Staff regarding certain developer agreements and to file a request to implement the contributions-in-aid-of-construction (CIAC) gross-up. The Utility responded with a Motion for Rehearing Reconsideration and for Leave to Amend. The Motion was denied by Order No. 21195, but a hearing was permitted to resolve the issue raised in Order No. 20762, the show cause order. The matter was set for hearing before the Division of Administrative Hearings (DOAH) and heard on February 12, 1990 as indicated earlier. Staff timely filed proposed findings of fact and conclusions of law with DOAH. The Utility did not file any proposed findings and conclusions.

The Hearing Officer's Recommended Order was filed on June 14, 1990. No exceptions to the Recommended Order were filed. The full text of the Recommended Order is set forth below.

STATEMENT OF THE ISSUES

The issues in this cause concern whether the Respondent, St. Johns North Utility Corp. ("St. Johns"), knowingly or willfully failed to comply with Public Service Commission Order No. 20409, requiring that entity to respond to certain requests for information adopted in that Order and to file a request for approval of the charging of its customers for the income tax implication of contributions-in-aid-of-construction ("CIAC"). That is, the Commission takes the position that by that Order, the utility was informed of the requirement to file a request for permission from the Commission to charge customers so-called CIAC "gross-up" charges and failed to do so. The other issue to be considered, conjunctively, concerns whether a penalty should be imposed against the Respondent and, if warranted, in what amount.

PRELIMINARY STATEMENT

This cause arose upon the issuance of Public Service Commission Order No. 20762, issued on February 17, 1989. That Order required the Respondent, St. Johns North Utility Corp. ("St. Johns, Utility"), to show cause in writing why it should not be fined up to $5,000.00 per day for

failure to comply with the provisions of Order No. 20409. Order No. 20409 had required a written response to certain questions posed to the Utility by the Commission concerning the existence and specifics of certain "developer agreements" regarding the provision of utility services. It also required that the Utility submit a written request to implement so-called "CIAC gross-up charges." The Utility responded to Order No. 20762 with a Motion for Rehearing, Reconsideration and for Leave to Amend. That Motion was denied by Order No. 21195. However, in rendering that Order, the Commission also permitted the Utility a Section 120.57, Florida Statutes, formal proceeding in order to resolve the issues raised in the show cause proceeding initiated by Order no. 20762, concerning whether the Utility had willfully failed to comply with Order No. 20409 and whether further penalties should be assessed and imposed.

This cause came on for hearing as noticed. At the hearing, the Commission presented the testimony of Jerrold E. Chapdelaine. The Respondent presented the testimony of C.E. Bohannon and Joseph E. Warren. The Petitioner adduced five exhibits. Petitioner's Exhibits 1 through 4 were admitted into evidence. Respondent's Exhibit 1 was admitted into evidence.

At the conclusion of the proceeding, the parties elected to order a transcript thereof and requested an extended briefing schedule, which was approved. The Commission submitted its proposed findings of fact and conclusions of law on a timely basis, and those have been specifically ruled upon in the Appendix attached hereto and incorporated by reference herein, as well as in the Recommended Order itself.

FINDINGS OF FACT

1. Pursuant to its authority to regulate water and sewer rates, charges and rate structures embodied in Chapters 367, Florida Statutes, and 25-30, Florida Administrative Code, the Public Service Commission entered Orders numbered 16971

and 17058, which adopted specific guidelines and conditions for utilities to implement certain income tax impact charges for contributions-in-aid-of-construction ("CIAC gross-up charges"). (See Orders numbered 20409, p.3; 16971, p.2-4; and 17058). One of these conditions requires that utilities submit appropriate tariff sheets (rates and charges sheets) for the Commission's approval prior to implementation of the CIAC gross-up charge.

2. CIAC is the payment or contribution of cash or property to a utility from a customer or entity seeking service from that utility in order to secure the provision of such services or to reserve it for a future time. The Internal Revenue Code of 1986 changed the treatment of CIAC from being non-taxable to being taxable as income. A CIAC gross-up charge is a method by which a utility can recover that tax expense, represented by the income tax assessed against collected CIAC, through approved rates and charges to customers. The amount of CIAC tax impact funds collected by a utility is not itself treated as CIAC for rate-making purposes.

3. The Respondent, St. Johns North Utility Corp., collected gross-up charges which were not authorized by its filed and approved tariff schedules (rate schedules), and without securing the requisite approval from the Commission. (See Orders numbered 20409 and 20762). The Commission was made aware of the charging of unauthorized CIAC gross-up charges by the Utility Respondent when a developer, Fruit Cove Limited, communicated with the Commission concerning its doubts about utility service being available for one of its subdivisions, when required, from the Respondent. Fruit Cove Limited had paid CIAC gross-up charges to St. Johns. On June 3, 1988, the Commission, through its staff, contacted Mr. Joseph E. Warren, the General Manager for the Respondent, and explained the Commission's requirements regarding the requisite pre-approval of the charging of CIAC gross-up charges. Mr. Warren agreed to file a written request for authorization to implement such charges. No request was filed, despite repeated

admonitions and solicitations by the Commission and its staff and a lengthy opportunity to comply.

4. Finally, Order No. 20409 was issued by the Commission on December 5, 1988, requiring the Utility to file a written request for authorization to implement CIAC gross-up charges within thirty (30) days of that Order. A written request was not timely filed, however. The Utility finally filed its written request for approval of these charges on September 5, 1989. The accompanying tariff sheets representing such charges were ultimately filed in response to Orders numbered 16971 and 20409, and Show Cause Order No. 20762. They became effective on September 15, 1989.

5. The Commission, through its staff, also made repeated inquiries to the Utility regarding certain service availability charges and practices, initially by letter of July 29, 1988. The Utility was allowed until August 19, 1988 to make the requested responses. The letter was addressed to Mr. Joseph Warren at the Utility's mailing address of record. The Utility, however, did not provide written responses to the comments and questions by the Commission, despite repeated assurances that it would do so. Order No. 20409, issued on December 5, 1988, required the Utility to provide the full written responses to the July 29, 1988 letter within thirty (30) days of the date of that Order. The responses were not timely made.

6. Order No. 20762 was issued on February 17, 1989, requiring the Utility to show cause in writing on or before March 13, 1989 why it should not be fined up to $5,000.00 per day, in accordance with the Commission's penalty authority, for failure to comply with the provisions of Order No. 20409, regarding the necessity for written responses to the Commission's specified questions and the submission of a written request to implement the CIAC gross-up charges referenced above.

7. The first item in the Commission's July 29, 1988 letter to the Utility had requested the

Utility to seek approval, including submission of proposed rate tariff sheets for authorization to implement the CIAC tax impact charge referenced above. That item was responded to on September 5, 1989, more than eight months after the deadline set by Order No. 20409.

8. The second item in the Commission's July 29, 1988 letter to the Utility had requested the Utility to provide the names and addresses of financial institutions in which gross-up charge funds were being retained. That item was responded to as requested.

9. The third item in the Commission's July 29, 1988 letter to the Utility had requested the Utility to provide a listing of all gross-up monies received from each contributor. No response was ever provided by the Respondent. The significance of the information requested by the Commission is that it would provide identity of the individuals who were entitled to a refund of the unauthorized CIAC gross-up charges collected by the Utility, as provided in Order No. 20762.

10. The fourth item in the Commission's July 29, 1988 letter to the Utility had requested the Utility to provide a copy of all current developer agreements. That item was responded to within the deadline set by Order No. 20409.

11. The fifth item in the Commission's July 29, 1988 letter to the Utility had requested the Utility to file revised tariff sheets indicating the actual legal description of the Utility's certificated service territory. No response was ever provided.

12. Order No. 20762 was ultimately issued on February 17, 1989 imposing a $5,000.00 fine on the Utility for serving outside of its authorized service area.

13. Order No. 20409 requested the Utility to indicate to the Commission whether, with regard to the developer agreement between the Respondent and

Fruit Cove Limited, the charges listed in the various paragraphs of that agreement would, upon completion of the real estate development involved, be adjusted to reflect actual utility service costs incurred. No response to that request was ever provided by the Utility. Additionally, in that Order, the Commission requested information concerning a so-called "step tank", which was referenced in paragraphs 12C and 13D of the developer agreement with Fruit Cove Limited. That request, in Order No. 20409, was never responded to. A certain fee was charged for installation of the step tank by the Utility to Fruit Cove Limited, and no response was given to the Commission's inquiry as to why that fee was omitted from the Utility's approved tariff on file with the Commission. The significance of the requested information was that the omission of the step tank installation fee from the Utility's tariff of rates and charges could cause the developer agreement to constitute a "special service availability agreement", which can only be approved in advance by the Commission. It is not a matter, approval of which has been delegated by the Commission to its staff members.

14. The Order referenced last above also requested an explanation for why a meter installation fee, referred to in that same developer agreement, does not include a "curb stop" or a meter box. This information is significant because it is necessary in order for the Commission to determine whether the charge involved is reasonable. A cost breakdown for the meter installation, including the various hardware components and other charges, was necessary and was not provided by the Utility.

15. Additional information concerning the area of service availability, required to be provided to the Commission by Order No. 20409, included the requirement that approval be obtained from the Commission for the CIAC gross-up charge in the developer agreement with Fruit Cove Limited. As stated above, that approval was not requested in writing, as required by the Order, for more than eight months after the deadline set by that Order.

16. By Order No. 20762, St. Johns was fined $5,000.00 for three separate violations of the statutes and rules, and the Orders enumerating them, for a total of $15,000.00. The Utility was fined for serving outside of its authorized service territory, for collecting unauthorized CIAC gross-up charges, and for failing to file its developer agreements with the Commission as required by law. The developer agreements were only submitted after repeated efforts by the Commission's staff which culminated in Order No. 20409 and which were either unresponded to or not properly responded to by the Utility. Additionally, by Order No. 21559, issued on July 17, 1989, St. Johns was fined $5,000.00 for failure to file an application for an extension of its territory as required by Order No. 20409.

17. In the meantime, by Order No. 22342, issued on December 26, 1989, the Commission approved a transfer of the Utility's assets from St. Johns to Jacksonville Suburban Utilities Corporation ("Jacksonville Suburban"). That Order did not authorize transfer of the liabilities of the Respondent to Jacksonville Suburban. The Order specifies that St. Johns, and not Jacksonville Suburban, will remain liable for the previously imposed refund obligations and fines. Only in the event that there remained sales proceeds in excess of the certain debt of St. Johns owed to its institutional lender would funds from the Jacksonville Suburban sale be applied toward payment of the refund and fines found to be due and owing by the above-cited Orders, by way of escrow or otherwise. Any excess proceeds, absent Order No. 22342, were to be paid to St. Johns. Order No. 22342 does not make Jacksonville Suburban liable for the refund and fines at issue. It is speculative whether there will be any sales proceeds available from the sale, after payment of the debt, to be applied toward the refund and fines. The sales price was made dependent upon establishment of the Utility's "rate base" amount, to be established in that transfer proceeding at a

point in time after entry of Order No. 22342. That Order, however, specifically preserves the liability of St. Johns for the refund and fines and does not provide for the extinguishment of such liability in the event that the sales proceeds prove to be insufficient to pay them.

CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding, by the authority of subsection 120.57(1), Florida Statutes (1989).

Contributions-in-aid-of-construction ("CIAC") mean any amount or item or money, services or property received by the Utility, from any person, governmental agency, or other entity, any portion of which is provided at no cost to the Utility and which is utilized to offset the acquisition, improvement or construction costs of the Utility's property, facilities or equipment used to provide service to the public. The term includes system capacity charges, main extension charges, and customer connection charges. See, Rule 25-30.515(3), Florida Administrative Code.

On or after January 1, 1987, in accordance with Commission Order Nos. 16971 and 17058, the Utility was authorized to collect from developers and others who transfer cash or property to a utility as CIAC, a "gross-up charge", in an amount equal to the income tax impact related to the CIAC contribution. Correspondingly, a utility must submit appropriate tariff charge sheets for Commission approval prior to implementation of the assessment of CIAC gross-up charges, pursuant to Order No. 17058.

Pursuant to Rule 25-30.135(2), Florida Administrative Code, no utility may modify or revise its schedule of rates and charges ("tariff") until it files and receives approval from the Commission for any such modification or revision. Rule 25-30.550(2), Florida Administrative Code, in turn, requires that any special service

availability contract with real estate developer entities, or other persons, shall be approved by the Commission prior to becoming effective.

The evidence adduced by the Petitioner was unrebutted in showing that St. Johns violated Order No. 20409 by not filing a request for authorization to implement CIAC gross-up charges within the time set forth in that Order. The Utility violated that Order by not filing written responses to the questions and comments incorporated in that Order within the time set forth by the Order. The Utility's response to two out of eleven items within the time limit set in that Order is not deemed to constitute "substantial compliance" with Order No. 20409. Indeed, there has been no showing that "substantial compliance" is a doctrine relevant to this case. The Order specified the particular responses required, and the subject matter thereof, and set a time certain for such responses, which were to be in writing. The Utility simply failed to comply.

Likewise, there is no doubt that, in view of repeated informal notification by the Commission through letters from its staff, and by multiple orders by the Commission as a part of its continuing efforts to procure compliance by the Utility, the Utility was fully aware of the requirements imposed upon it by the Commission through its statutes and rules, enunciated in the above-cited Orders, and was aware of the deadlines for submittal of the required information. Thus, the violations of the statutes and rules embodied in the above-cited Orders constitute knowing and willful violations of those statutes. See, Section 367.161(1), Florida Statutes (1987).

In light of the Respondent's actual knowledge of the Commission's mandate in Order No. 20409, coupled with its history of violations and lack of cooperation, even after it knew of the specifics of what was required of it by the Commission in the above factual regards; it must be concluded that the Utility's failure to comply with Order No. 20409 was knowing and willful even though it is

understood by the Hearing Officer that that willfulness might have been tempered by financial impossibility.

Section 367.161(1), Florida Statutes (1987), provides, in effect, that if any utility, by any authorized officer, agent or employee knowingly refuses to comply with, or willfully violates, any provision of Chapter 367, Florida Statutes, which sets forth the Commission's regulatory authority over water and sewer utilities, or knowingly violates or refuses to comply with any lawful rule or order of the Commission, the utility shall be subject to a penalty for each such offense of not more than $5,000.00. The Commission is authorized in those statutory provisions to fix, impose and collect such a penalty. Each day of such refusal or violation constitutes a separate offense. It is further provided in that subsection that each penalty constitutes a lien upon any real and personal property held by the utility, enforceable as a statutory lien pursuant to the provisions of Chapter 85, Florida Statutes.

The case of Deltona Corporation v. Florida Public Service Commission, 220 So.2d 905, 908 (Fla. 1969), made it clear that the Commission has authority to impose penalties within the statutory limits authorized it, which are sufficiently weighty as to insure compliance with its orders. Commission Orders numbered 20137, 20781, and 20884 indicate that the Commission follows a policy of considering a utility's compliance history in determining to assess penalties and the amount thereof. A utility's financial difficulties, particularly those which are largely self-imposed, are not deemed to be grounds for leniency in assessing penalties against a utility for serious and repeated violations of statutes, rules or orders the Commission has been charged with enforcing. See, Order No. 20781 (p. 2).

Order No. 22342 provides that the Commission has interpreted the provisions of Section 367.171, Florida Statutes, generally to the effect that where assets of a utility are transferred, as

opposed to a transfer of stock of the entity, that the transferor remains liable for violations occurring before approval of the transfer by the Commission.

Finally, when a utility becomes subject to regulation by a county, all cases in which it was a party, pending before the Commission, or in any court of appeal from any order of the Commission, remain within the jurisdiction of the Commission or the court until disposed of in accordance with the law in effect on the day the case was filed. See, Section 367.171(5), Florida Statutes (1989).

Accordingly, there is no question concerning the authority of the Commission to impose the fine sought in this case; and the evidence establishes the knowing, repeated and willful nature of the violations, albeit they may have resulted in large part from the extreme financial difficulty which the Utility experienced at times pertinent hereto. There is no question that the evidence of the Utility's repeated and knowing violation, coupled with the Commission's repeated formal and informal efforts to obtain compliance with its directives, justifies a significant penalty in this instance.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is therefore,

RECOMMENDED that St. Johns be assessed a penalty of $5,000.00 for knowingly and willfully failing to comply with Order No. 20409.

Upon consideration, we find the Hearing Officer's findings to be supported by competent substantial evidence in the record and, therefore, adopt his Recommended Order and assess the recommended penalty of $5,000 against St. Johns North Utility Corp.

In Docket No. 891110-WS, we transferred St. Johns North to Jacksonville Suburban Utilities Corp. Pursuant to the Order

issued in that docket, Order No. 22342, we required that any sales proceeds remaining after payment of debt to the institutional lender would be applied to the payment of refunds and fines. The Order further states that St. Johns North, not Jacksonville Suburban Utilities Corp., would remain liable for the refund and fines. Accordingly, this docket will remain open for the collection of the fine assessed herein.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that each and every finding herein is hereby specifically approved. It is further

ORDERED that St. Johns North Utility Corp. is hereby assessed a $5,000.00 fine for the reasons set forth in the body of this Order. It is further

ORDERED that this docket shall remain open for the collection of the fine as set forth in the body of this Order.

By ORDER of the Florida Public Service Commission this 27th day of August, 1990.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

NSD/MF

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.

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 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 or sewer 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.