



Public Service Commission

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DATE: 03/22/2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF ECONOMIC REGULATION (MERCHANT)
DIVISION OF LEGAL SERVICES (JAEGER)

RE: DOCKET NO. 950387-SU - APPLICATION FOR A RATE INCREASE FOR NORTH FT. MYERS DIVISION IN LEE COUNTY BY FLORIDA CITIES WATER COMPANY - LEE COUNTY DIVISION.
COUNTY: LEE

AGENDA: 04/03/01 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION DEPENDENT ON VOTE IN ISSUE 1

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\950387.RCM

CASE 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, the Commission 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, the Commission

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approved final rates which would have resulted in a rate reduction and a refund of the PAA implemented interim rates.

FCWC filed its notice of appeal of Order No. PSC-96-1133-FOF-SU on October 7, 1996. On January 12, 1998, the First 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, the Commission automatically 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, the Commission established final rates which were slightly higher than the original rates but lower than the PAA implemented rates. The Commission ordered the difference between the PAA implemented rates and the final rates to be refunded with interest.

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 an exempt governmental entity. 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, the Commission noted that the instant wastewater rate case docket for North Ft. Myers is still open and that the utility has been directed to make refunds pursuant to the Final Order on Remand. Therefore, the Commission kept the transfer docket open and did not cancel the certificates for this utility pending the final outcome in this docket.

The Commission lost its regulatory authority over the prospective rates of this utility as of April 15, 1999, the date of the transfer to GUA. However, pursuant to Section 367.171(5), Florida Statutes, and the holding in Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995), the Commission has continuing jurisdiction to conclude this

overearnings investigation. 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.," 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 the Commission, all financial responsibility or liability for any rate relief, refund or other obligations imposed by the Commission shall remain with FCWC and shall expressly not be assumed by the GUA.

Staff believes that the remaining issues pertaining to this rate case are the completion of the refund, staff's 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, staff believes that the effective date of the Final Order on Remand is the date of the First District Court of Appeal'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. This recommendation addresses FCWC's Motion and Request for Oral Argument on the Motion.

The Commission has jurisdiction pursuant to Sections 367.011(2), 367.082, and 367.171(5), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should FCWC's request for oral argument on its Motion to Approve Refund Methodology be granted?

RECOMMENDATION: Yes. Because of the unusual circumstances surrounding this refund proceeding, the subsequent sale of the utility, and the delay brought about by the appeal of the Final Order on Remand, staff believes that oral argument would aid the Commission in comprehending and evaluating the issues before it. Therefore, staff recommends that the utility's request for oral argument should be granted. Pursuant to Rule 25-22.058(2), Florida Administrative Code, oral argument should be limited to 15 minutes for each party. (JAEGER)

STAFF ANALYSIS: On February 14, 2001, FCWC filed a Motion to Approve Refund Methodology (Motion), which is the subject of Issue 2 of this recommendation. In its Motion, FCWC notes that there is an apparent inconsistency between the Final Order on Remand (Order No. PSC-99-0691-FOF-SU) and Rule 25-30.360(3), Florida Administrative Code. The utility argues that the Final Order on Remand requires refunds to be made "to customers of record as of the date of this Order pursuant to Rule 25-30.360(3), Florida Administrative Code." However, the utility notes that Rule 25-30.360(3), Florida Administrative Code, states: "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."

Contemporaneous with the filing of the Motion, FCWC filed a Request for Oral Argument on its Motion pursuant to Rule 25-22.058, Florida Administrative Code. Pursuant to that Rule, the Commission may, in its discretion, grant oral argument upon request of any party to a formal hearing conducted pursuant to Section 120.57, Florida Statutes. Rule 25-22.058(1), Florida Administrative Code, requires that the party requesting oral argument state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. FCWC claims that oral argument would aid the Commission because it would give the parties the opportunity to discuss application of the law to the specific and unusual circumstances regarding the refund to be made in this docket.

Moreover, staff notes that FCWC was sold on April 15, 1999, to the Florida Governmental Utility Authority (GUA), an exempt governmental entity. Because of the unusual circumstances surrounding this refund proceeding, the subsequent sale of the utility, and the delay brought about by the appeal of the Final

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Order on Remand, staff believes that oral argument would aid the Commission in comprehending and evaluating the issues before it. Therefore, staff recommends that the utility's request for oral argument should be granted. Pursuant to Rule 25-22.058(2), Florida Administrative Code, oral argument should be limited to 15 minutes for each party.

ISSUE 2: Should FCWC's Motion to Approve Refund Methodology be granted?

RECOMMENDATION: FCWC's Motion to Approve Refund Methodology should be granted in part and denied in part. The refunds should be made on a per customer basis as set forth in Rule 25-30.360(3), Florida Administrative Code. However, the utility's request to compute the refunds using a multiplier of 10.6% should be denied, and the refund multipliers and periods should be as directed in the Final Order on Remand. Refund checks should be sent to customers that were still on the system as of April 15, 1999, the date the system was sold to the GUA, not as of April 8, 1999, the issuance date of the Final Order on Remand. The utility should complete the mailing of the refund checks to current customers within 30 days of the issuance date of the Order, and within 12 months of the issuance date of the Order to those customers who have left the system. Moreover, the noticing requirements should be as set forth in the body of the recommendation. Based upon changed circumstances, the Commission should recede from its prior decision made in the Final Order on Remand which requires all unclaimed refunds to be treated as cash CIAC, and the utility's request to treat any unclaimed refunds as cash CIAC should be denied. FCWC's proposal to calculate interest pursuant to Rule 25-30.360(4), Florida Administrative Code, and to submit refund reports pursuant to the requirements of Rule 25-30.360(7), Florida Administrative Code, should be approved. The appropriate disposition of unclaimed refunds should be addressed at a later date after the utility has made an effort to find those customers who are no longer on the system, as set forth in the body of the recommendation. Finally, the utility's request to offset the costs of the refund against any unclaimed refunds should be denied. (MERCHANT, JAEGER)

STAFF ANALYSIS: 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 states that the refund can be completed on a per customer basis, and notes that the refund is the result of a specific rate change. 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. Staff agrees with FCWC that the Final Order on Remand is inconsistent with the rule and believes that refunds should go 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. Staff disagrees with this methodology. 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. Staff does not agree with FCWC's proposed weighted average. The Final Order on Remand specifically addressed the refund percentages for each period and FCWC has not shown any reason why the Commission's decision on this matter is in error, unduly burdensome, or otherwise inherently unfair such that it should be changed.

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

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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.

FCWC proposes that refund checks be issued and mailed only to the customers of record on April 8, 1999. Staff notes that the Post Office will only deliver to a forwarding address for one year after a person has submitted the card for forwarding. However, the Post Office 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. 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 mailing address.

Staff agrees with the utility that refund checks should be sent to customers that are still on the system. However, the cutoff date should be April 15, 1999, the date the system was sold to the GUA, not the issuance date of the Final Order on Remand, April 8, 1999. The utility should complete the mailing of the refund checks to current customers within 30 days of the issuance date of the Order, and within 12 months of the issuance date of the Order to those customers who have left the system.

Staff also disagrees with what appears to be the utility's proposal to publish only one newspaper notice. The refund period for this case spans more than five years. Staff recommends that a newspaper notice once per week for one month will be a more reasonable attempt to find customers that have left the system.

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

FCWC also proposes that the Commission 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

document dated April 1, 1999, between FCWC and the GUA, 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 the Commission allow FCWC 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.

Staff recognizes 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 was issued and staff believes 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. Staff notes 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.

Staff recognizes that in Peoples Gas System, Inc. V. Mason, 187 So. 2d 335, 339 (Fla. 1966), the Florida Supreme Court found that

orders 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

[w]e 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 [C]ommission 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.

Id.

Moreover, staff notes that Rule 25-30.360(1), Florida Administrative Code, states that "[w]ith the exception of deposit refunds, 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, where the specific customer cannot be found, any unclaimed refunds will inure to the benefit of the general body of ratepayers. 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 inure to the benefit of the shareholders rather than to the general body of ratepayers. Staff believes 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, staff recommends that the Commission recede from its decision made in the

Final Order on Remand which required all unclaimed refunds to be treated as cash CIAC and that the utility's request to treat any unclaimed refunds as cash CIAC should be denied.

Staff further recommends that the disposition of unclaimed refunds should not be addressed at this time. Rather, the utility should 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 should file a final report as required by Rule 25-30.360(7), Florida Administrative Code, after which time staff will bring a recommendation to the Commission as to the appropriate disposition of the unclaimed refunds.

Moreover, staff does not agree with FCWC's proposal for the Commission to allow FCWC the ability to offset the administrative costs of the refund against any unclaimed refund checks. The Commission has 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 should be denied.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open in order for the utility to submit the refund reports and for the Commission to address the appropriate disposition of unclaimed refunds at a later date, after the utility has made an effort to find those customers who are no longer on the system, as set forth in Issue 2. (JAEGER)

STAFF ANALYSIS: This docket should remain open in order for the utility to submit the refund reports and for the Commission to address the appropriate disposition of unclaimed refunds at a later date, after the utility has made an effort to find those customers who are no longer on the system, as set forth in Issue 2.