

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for) DOCKET NO. 910110-WS
continuation of gross-up of) ORDER NO. PSC-94-0023-FOF-WS
contributions-in-aid-of-) ISSUED: January 6, 1994
construction (CIAC) in Lee)
County by GULF UTILITY COMPANY.)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

Background

By Order No. 16971, issued December 18, 1986, the Commission granted approval for water and wastewater utilities to amend their service availability policies to meet the tax impact on contributions-in-aid-of-construction (CIAC) resulting from the amendment of Section 118(b) of the Internal Revenue Code. Order No. 23541, issued October 1, 1990, ordered utilities currently grossing-up CIAC to file a petition for continued authority to gross-up and also ordered that no utility may gross-up CIAC without first obtaining the approval of this Commission. Orders No. 16971 and 23541 also prescribed the accounting and regulatory treatments for the gross-up and required refunds of certain gross-up amounts collected. On February 1, 1991, pursuant to Order No. 23541, Gulf Utility Company (Gulf or utility) filed its request for continuation of CIAC gross-up.

On July 30, 1992, the Commission issued Proposed Agency Action Order No. PSC-92-0742-FOF-WS, authorizing the utility's continued gross-up of CIAC. On August 20, 1992, Southwest Florida Capital Corporation (SFCC) filed a protest to Order No. PSC-92-0742-FOF-WS and requested a formal hearing pursuant to Section 120.57(1), Florida Statutes. On March 30, 1993, the Florida Waterworks Association (FWWA) filed its Petition to Intervene which was granted by Order No. PSC-93-0653-PHO-WS, issued April 22, 1993. A prehearing conference was held in Tallahassee, Florida, on April 2, 1992, and the hearing was held May 5 and 6, 1993, in Tallahassee, Florida.

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FPSC-RECORDS/REPORTING

On August 18, 1993, the Commission issued Order No. PSC-93-1207-FOF-WS (Final Order), granting Gulf authority to continue its CIAC gross-up. On September 2, 1993, SFCC filed a Motion for Reconsideration of Order No. PSC-93-1207-FOF-WS. On September 7, 1993, Gulf filed a Response to the Motion for Reconsideration. This recommendation addresses SFCC's Motion for Reconsideration and the utility's response.

MOTION FOR RECONSIDERATION

In its Motion for Reconsideration, SFCC requested that the Commission reconsider its decision as reflected in the Final Order and rule that the benefits of depreciation be preserved for the contributor of the CIAC. In its Motion, SFCC alleged that the Commission overlooked and failed to address a determinative constitutional argument made by SFCC with respect to the treatment of depreciation benefits.

Specifically, SFCC argued that the contributor should receive the benefit of the depreciation for the reasons set forth below:

1. The collection of full gross-up for taxes creates a property right in the depreciation which was paid for by the contributor, and which the Commission may not take and give to third parties. City of Gainesville v. Seaboard Coastline R.R., 385 So.2d 1069 (Fla. 1st Dist. 1980).
2. For the rate here to be compensatory only, either the net present value gross-up method must be adopted, or the excess benefits must be repaid to the customer paying the funds. See Department of Agriculture and Consumer Services v. Polk, 568 So.2d 35 (Fla. 1990).
3. Granting the depreciation benefits to anyone other than the contributor or its successor is a deprivation of property without due process of law.

In its response to SFCC's motion, Gulf stated that the Commission did address the treatment of depreciation benefits issue in great detail. We agree. First, we believe that SFCC is merely rearguing that the net present value method is the more appropriate method, and is the method which allows the rate to be compensatory only. Second, SFCC's arguments must fail for lack of authority or merit.

The findings in the two cases cited by SFCC are not relevant to this case. In City of Gainesville, the Court held that a special assessment levied by the City against Seacoast Railroad would be confiscatory only if the railroad was not benefitted by the improvement to the extent of the assessment. Id. at 1072. A special assessment levied by the City for street paving cannot be compared to the collection of a service availability charge which a contributor willingly pays if he would like to receive service from a particular utility. The benefit the developer receives by making the contribution is the ability to better market the home he has built. Additionally, the developer generally recoups his costs when he sells his home.

In Dept. of Agric., a plant nursery filed a suit against the Department of Agriculture alleging that the destruction of a citrus nursery, infected by bacteria, was a taking for which the nursery was entitled to compensation. The Court found that such destruction was not a taking, but that the nursery was entitled to just compensation for the plants not infected. Id. at 43. In both cases, the Courts were addressing "property interests." We believe that the mere contribution of lines or cash to a utility does not result in giving the developer a property interest.

Section 367.101, Florida Statutes, provides us with the exclusive authority to set just and reasonable charges and conditions for service availability. With respect to the gross-up of CIAC, we have clearly set forth our procedure in prior Commission orders. Further, we believe that we have properly exercised our authority in this instance, and have considered every fact in the record of this proceeding. However, SFCC has not met the standard for determining whether reconsideration is appropriate.

In Diamond Cab Company of Miami v. King, 146 So.2d 89 (Fla. 1962), the Court held that the purpose for a petition for reconsideration is to bring to the attention of the Commission some point which it overlooked or failed to consider when it rendered its decision in the first instance, such as a mistake of law or fact.

We have not overlooked nor failed to consider any point of fact or law. On page 18 of Order No. PSC-93-1207-FOF-WS, we specifically found that the tax depreciation benefits should be passed back to the utility ratepayer, because, as stated in the Order, "it is reasonable to conclude that generally, developers

recover their costs." Furthermore, we reiterated our earlier finding in Order No. 23541 in stating that:

although market conditions may determine the selling price of a home, any time a developer has made a profit, it has recovered the costs of CIAC and the related taxes, and that if the costs are passed on to the ultimate ratepayer, the contributor and the ratepayer are one of the same. Based on that premise, we conclude that ultimately, the contributor and the ratepayer are one and the same.


Upon consideration of the foregoing, we believe that we were clear in our intent with respect to the depreciation benefits. We believe that the developer can recover the cost of his contribution elsewhere, for example, in the price of a home, and therefore, the depreciation benefits should be passed back to the ratepayer. Because we have not overlooked nor failed to consider any points of fact or law, we find that it is appropriate that SFCC's Motion for Reconsideration be denied. This docket may be closed if an appeal is not timely filed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Southwest Florida Capital Corporation's Motion for Reconsideration be denied. It is further

ORDERED that this docket may be closed if an appeal is not timely filed.

By ORDER of the Florida Public Service Commission this 6th day of January, 1994.



STEVE TRIBBLE, 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 120.59(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 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.