

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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RECORDS AND REPORTING

**DATE:** NOVEMBER 18, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF LEGAL SERVICES (JAEGER) *RJA MCL*  
DIVISION OF WATER AND WASTEWATER (CHU, DEWBERRY, MUNROE) *PD C RR 2*

**RE:** DOCKET NO. 980242-SU - PETITION FOR LIMITED PROCEEDING TO IMPLEMENT TWO-STEP INCREASE IN WASTEWATER RATES IN PASCO COUNTY BY LINDRICK SERVICE CORPORATION. *bl*

**AGENDA:** 11/30/99 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\980242IR.RCM

CASE BACKGROUND

Lindrlick Service Corporation (Lindrlick or utility) is a Class B utility located in Pasco County (County). According to the utility's annual report, for the year ended December 31, 1997, the utility provided water and wastewater services to approximately 2,283 water customers and 2,203 wastewater customers.

Lindrlick's last previous rate case was finalized on November 16, 1983, by Order No. 12691, in Docket No. 830062-WS. In Docket No. 860089-SU, the Commission initiated an overearnings investigation and lowered rates for the wastewater system only.

In another overearnings investigation, by Order No. PSC-97-1501-FOF-WS, issued November 25, 1997 in Docket No. 961364-WS, the Commission addressed Lindrick's 1995 earnings level and the disposition of wastewater revenues collected subject to refund. Based on the revenue deficiency of \$81,594 for the water system and the revenue excess of \$26,910 for the wastewater system, the

DOCUMENT NUMBER-DATE  
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Commission found that on a combined basis the company had a \$54,684 revenue deficiency. The Commission found that the customers and service area would be virtually the same for both water and wastewater, the Commission found that the interest of both the customers and the utility would be best served by allowing the utility to offset the overearning in the wastewater system by the even greater underearning in the water system.

On February 12, 1998, Lindrick filed this application, pursuant to Section 367.0822, Florida Statutes, for a limited proceeding to increase its wastewater rates. This requested increase in wastewater rates was based upon the Florida Department of Environmental Protection's (DEP) Notice of Violation and Order for Corrective Action issued on January 13, 1998, and the resulting increase in cost of the wastewater operation. In the Notice of Violation and Order for Corrective Action, DEP ordered Lindrick to eliminate intrusion/infiltration into Lindrick's collection system and to meet the effluent limits of the permit or initiate actions that would cease surface water discharge into Cross Bayou.

Lindrick decided to take its wastewater treatment plant off line, ceasing surface water discharge, and send the raw effluent to the City of New Port Richey (City) in order to comply with DEP's requirements. The City then sends the treated wastewater to the County's reuse system. Effluent chloride is an inherent problem for Lindrick, given the location of its service area and the age of the system.

The County's reuse system limits the chloride level of the water entering the system. (Reuse water is primarily used for irrigation and excess chlorides are detrimental to plant life). In order to meet the required chloride level so that Lindrick's effluent treated by the City could be accepted into the County's reuse system, it was necessary for Lindrick to improve its collection system to further reduce the chloride level.

In its original application, Lindrick requested an emergency rate increase of 47.13% effective immediately, and a second rate increase of 130.12% effective upon the completion of the interconnection with the City. At that time, Lindrick was still negotiating with the City for an agreement. On May 18, 1998, the New Port Richey City Council approved a Bulk Wastewater Agreement between the City and Lindrick. Under the terms of the Agreement, actual connection to the City was conditioned upon proof that the chloride levels in Lindrick's wastewater system effluent did not exceed 600mg/L.

On September 3, 1998, Lindrick filed its first revised application, which changed the emergency rate increase previously requested to a request for a non-emergency Phase-I increase of 84.95% to allow recovery of the cost of (a) collection system improvements necessary to reduce chloride level; and (b) the City's bulk wastewater treatment rate. The requested Phase-II rate increase was 131.55% to allow the recovery of (a) the remaining investments and costs associated with the interconnection, including the cost of collection system improvements necessary to further reduce the chloride level below 400mg/L; (b) the return on the investments based on the utility's approved rate of return; and (c) the additional contractual services expenses.

On April 19, 1999, Lindrick submitted its second amended petition to request a Phase-I wastewater rate increase of 133.26%, and a Phase-II wastewater rate increase of 142.67% assuming no change in related party services. The second amended petition also added a proposed water rate increase of 19.05% for Phase-II assuming no change in related party services. The utility represented that the water rate increase was requested due to underearning experienced by the water operation for the year ended December 31, 1997. The second amended petition also stated that "the required new transfer pumping facility would be completed prior to May 12, 1999. Under the Bulk Wastewater Agreement with the City, Lindrick was required to commence bulk wastewater treatment on or before May 12, 1999 or risk termination of the Agreement by the City." The petition stated that "Lindrick also faced substantial monetary penalties under the DEP Consent Order if bulk treatment service from the City was not commenced prior to May 19, 1999." Consequently, Lindrick requested an emergency, temporary increase in wastewater rates to recover the cost for the Phase-I wastewater revenue requirement prior to May 12, 1999.

By Order No. PSC-99-1010-PCO-SU, issued May 20, 1999, the Commission approved a 59.89% increase in revenue for emergency rates on a temporary basis (hereinafter emergency rates) for the utility. These emergency rates were approved subject to refund pending the Commission's final decision. The utility provided an irrevocable letter of credit for security for a potential refund and the emergency rates became effective for service rendered on or after May 27, 1999.

In its application for the rate increase, the utility requested an across the board percentage increase to existing rates. Its calculation included the increase in plant improvements required for the interconnection and changes for operating expenses affected by the interconnection. The utility interconnected with

DOCKET NO. 980242-SU  
DATE: November 18, 1999

the City on May 28, 1999. By Proposed Agency Action (PAA) Order No. PSC-99-1883-PAA-SU, issued September 21, 1999, the Commission proposed to allow Lindrick to increase its rates on a permanent basis by 91.26 percent. By that same Order, by final agency action, the Commission authorized rates on a temporary basis (hereinafter temporary rates) in the event of protest.

Subsequent to the issuance of that Order (and prior to September 30, 1999), the utility advised staff that it would be protesting the PAA portion of the Order. Further, on September 30, 1999, the utility submitted its revised tariff sheets with the general service and residential service for wastewater, the approved Notice to Customers of Temporary Wastewater Rate Increase, and the appropriate Amended Irrevocable Letter of Credit in the amount of \$876,569 as required by Order No. PSC-99-1883-PAA-SU. The tariffs were approved by staff for service rendered on or after October 1, 1999.

However, on October 8, 1999, the Office of Public Counsel (OPC), filed its Notice of Intervention and its Motion for Order Requiring Refunds With Interest for Collecting Unlawful Rates. Further, both the utility and OPC filed their timely protests and petitions (alleging disputes of material fact) of PAA Order No. PSC-99-1883-PAA-SU on October 11, 1999 and October 12, 1999, respectively. Finally, on October 20, 1999, Lindrick filed its Response to OPC's Motion for Order Requiring Refunds With Interest for Collecting Unlawful Rates.

A formal hearing has been scheduled for the petitions protesting PAA Order No. PSC-99-1883-PAA-SU. This recommendation addresses OPC's Motion for Order Requiring Refunds With Interest for Collecting Unlawful Rates, the utility's response, and whether a show cause proceeding should be initiated.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should OPC's Motion for Order Requiring Refunds With Interest for Collecting Unlawful Rates be granted?

**RECOMMENDATION:** OPC's motion should be granted in part and denied in part. Specifically, for the emergency rates, Lindrick Service Corporation should be required to refund with interest (through a credit on the bills) all increased revenues associated with implementing the emergency rates for service provided prior to May 27, 1999. For the temporary rates, the utility should be required to refund with interest (through a credit on the bills) all increased revenues associated with implementing the temporary rates for service prior to October 11, 1999, and not the October 12, 1999 date requested by OPC. All refunds should be made in accordance with Rule 25-30.360, Florida Administrative Code, and should be completed within 45 days of the issuance date of the Order requiring refunds. (JAEGER, CHU, DEWBERRY)

**STAFF ANALYSIS:** On October 8, 1999, OPC filed its Motion for Order Requiring Refunds With Interest for Collecting Unlawful Rates (Motion). The tariffs for emergency rates were approved for service rendered on or after May 27, 1999. However, OPC notes that many of the bills implementing the new emergency rates were for meter readings covering a period beginning a few days prior to May 27, 1999. Staff has seen one bill where the reading was for service rendered from May 24, 1999 to June 23, 1999. Therefore, the utility improperly charged this customer for three days of service at the higher rates.

In its Response filed October 20, 1999, the utility admits that this was a mistake on the part of its billing agent, and the billing agent is proceeding to credit the customers' bills with the proper proration and interest. Further, the utility states that it has been submitting the proper reports and has never tried to hide anything. However, the utility does admit that it inadvertently captured approximately three days consumption and that it will apply a full credit, with interest, consistent with Rule 25-30.360, Florida Administrative Code, in its next billing cycle. Therefore, this portion of OPC's Motion should be granted. All refunds should be in accordance with Rule 25-30.360, Florida Administrative Code, and should be completed within 45 days of the date of the Order requiring refunds.

OPC also argues that the utility improperly implemented the temporary rates. As stated in the Case Background, the utility

DOCKET NO. 980242-SU  
DATE: November 18, 1999

advised staff that it would be protesting PAA Order No. PSC-99-1883-PAA-SU, and filed the appropriate tariffs, customer notice, and security (Amended Irrevocable Letter of Credit) on September 30, 1999. Staff approved these tariffs effective October 1, 1999.

In its Motion, OPC cites to the seventh ordering paragraph of Order No. PSC-99-1883-PAA-SU, and states that the paragraph provides "that tariff sheets could not be approved until: (1) staff verified the tariff pages were consistent with the Commission's decision; (2) the protest period had expired; (3) the customer notice was determined to have been adequate; and (4) any required security had been provided."

Because the Order was not issued until September 21, 1999, OPC notes that the protest period did not expire until October 12, 1999. Therefore, OPC argues that the earliest date for approval should be October 12, 1999, and any increased rates prior to that date should be refunded with interest. Further, OPC notes that the utility has violated even the October 1, 1999 date by billing customers for service from August 24, 1999 through September 24, 1999.

The utility admits that its billing agent again made a mistake in implementing the temporary rates and agrees that all service prior to October 1, 1999 should be billed at the emergency rate level and not at the temporary rate level. To the extent that it did not do this, the utility states that it will give credits with interest. However, the utility states that the language "that the protest period has expired" is only applicable to PAA rates and not temporary rates. Further, the utility argues that the temporary rates were approved as final agency action and could be effective on the date of the Commission vote, provided that the utility complied with all the other conditions of the Order. The utility states that it would have proceeded with the credits on this error, but is awaiting the Commission's final disposition of when the temporary rates should have become effective.

Staff believes that the clear intent of the Commission at the August 31, 1999 Agenda Conference was to protect the utility from irreparable harm by allowing temporary rates pending any resolution of final rates. Staff notes that, in addition to the Order as a whole, there are four specific ordering paragraphs which must be considered. The seventh, eighth, thirteenth, and fifteenth ordering paragraphs state as follows:

ORDERED that prior to its implementation of the rates approved herein, Lindrick Service Corporation shall

submit and have approved revised tariff pages. The revised tariff pages shall be approved upon our staff's verification that the pages are consistent with our decision herein, that the protest period has expired, that the customer notice is adequate and that any required security has been provided. It is further

ORDERED that Lindrick Service Corporation's rates shall be effective for service rendered on or after the stamped approval date on the tariff sheet pursuant to Rule 25-30.475(1), Florida Administrative Code, provided that the customers have received proper notice. It is further

ORDERED that in the event of a protest by any substantially affected person, Lindrick Service Corporation is authorized to collect the rates approved on a temporary basis, subject to refund in accordance with Rule 25-30.360, Florida Administrative Code, provided that Lindrick Service Corporation first furnishes and has approved by our staff, adequate security for any potential refund and a proposed customer notice. It is further

ORDERED that in the event of a protest, prior to its implementation of the rates on a temporary basis, Lindrick Service Corporation shall submit and have approved a bond or letter of credit in the amount of \$876,569 as a guarantee of any potential refund of revenues collected pursuant to the previous emergency temporary rates and the temporary rates approved in this Order. Alternatively, the utility may establish an escrow account with an independent financial institution as set forth in the body of this Order.

Staff notes that the seventh ordering paragraph contains the language "that the protest period has expired". However, staff believes that this is standard language for implementing PAA rates and is only applicable to whether the PAA rates have become final. In this case, the utility is implementing temporary rates, which was approved as final agency action, and not the PAA rates.

However, Staff notes that the Order states that the rates would be approved on a temporary basis in the event of protest. The approval of temporary rates is for the protection of both the utility and the customers. Of course if there were no protests, then the rates would have become final (upon the expiration of the

protest period and the issuance of a consummating order) and no security would have been required. Further, staff believes that at the time of the Commission vote, the Commission realized that the utility could have been irreparably harmed if it had had to wait until the conclusion of formal proceedings, only to find (at the conclusion of the formal proceedings) that the utility was entitled to the same rates as the PAA rates.

Staff initially interpreted the Commission action at the August 31, 1999 Agenda Conference as set forth in Order No. PSC-99-1883-PAA-SU, to allow the utility, depending on the filing of a protest, to either implement the PAA rates as final rates at the conclusion of the protest period, or to implement the rates on a temporary basis pending the outcome of any formal proceedings and upon the utility providing the appropriate revised tariffs, customer notice, and security. Therefore, when the utility orally advised staff that it was protesting the PAA portion of the Order and filed the appropriate tariff sheets, customer notice, and security (security would not have been needed if the rates had been final) on September 30, 1999, through this misapprehension, staff approved the tariffs effective October 1, 1999.

However, pursuant to OPC's Motion, staff has now closely reviewed the language found in the Order approving the temporary rates. The language explicitly states that "in the event of a protest" the utility would be entitled to the rates on a temporary basis. No "official" protest was filed until the utility filed its protest on October 11, 1999 (one day prior to the last day for a timely protest). Therefore, staff believes that pursuant to the Order of the Commission, the utility should not have been allowed to implement the temporary rates until October 11, 1999.

Based on all the above, staff recommends that the utility be required to refund with interest the increased revenues associated with the utility having improperly implemented (and staff having mistakenly approved) the temporary rates for service rendered prior to October 11, 1999. However, OPC has requested that the utility be made to refund all increased revenues associated with the utility having improperly implemented the rates prior to October 12, 1999. Therefore, this part of OPC's Motion concerning the refund of temporary rates should be granted in part and denied in part as set forth above. All refunds should be made in accordance with Rule 25-30.360, Florida Administrative Code, and should be completed within 45 days of the issuance date of the Order requiring refunds.



**ISSUE 2:** Should the Commission order Lindrick Service Corporation to show cause, in writing, within twenty-one days, why it should not be fined an amount up to \$5,000 for each offense for its apparent failure to properly implement both the emergency rates and temporary rates as authorized by Orders Nos. PSC-99-1010-PCO-SU, issued May 20, 1999, and PSC-99-1883-PAA-SU, issued September 21, 1999, respectively?

**RECOMMENDATION:** No, a show cause proceeding should not be initiated for the utility's apparent failure to properly implement the emergency and temporary rates authorized by Orders Nos. 99-1010-PCO-SU and PSC-99-1883-PAA-SU. (JAEGER)

**STAFF ANALYSIS:** As stated above, for both the emergency rates, effective May 27, 1999, and the temporary rates, approved by staff effective October 1, 1999, the utility inappropriately charged the increased rates for service which occurred prior to those dates, in apparent violation of Orders Nos. PSC-99-1010-PCO-SU and PSC-99-1883-PAA-SU. Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission.

Pursuant to Section 367.021(12), Florida Statutes, utilities are charged with the knowledge of the Commission's rules and statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc. the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's failure to properly implement the approved emergency and temporary rates, would meet the standard for a "willful violation." Staff has analyzed the apparent violations using the above-noted criteria.

In each instance, the utility appeared to make the same mistake, i.e., after the tariffs were approved, it used the approved rates for the very next billing, even though that billing was based, at least in part, on service rendered prior to the

DOCKET NO. 980242-SU  
DATE: November 18, 1999

effective date. The utility now understands that the new rates must apply only to service rendered on or after the effective date, and has agreed to make refunds with interest in any case where the new rates were applied to service rendered prior to the appropriate effective dates.

Staff believes that the utility's act was "willful" in the sense intended by Section 367.161, Florida Statutes. While the utility's failure to properly implement the emergency and temporary rates could be said to be willful, staff believes that the utility's actions do not rise in these circumstances to the level which warrants the initiation of a show cause proceeding. The utility agrees that it erred in implementing the tariff sheets for the rates approved and has agreed to make the refunds. Further, staff approved the tariff sheets for the rates approved for the period on or after October 1, 1999, and the utility merely inappropriately charged the increased rates for service which occurred prior to those dates. Therefore, staff believes that a refund with interest as set forth in Issue 1 above is sufficient, and recommends that the Commission not order Lindrick to show cause for its apparent failure to properly implement the emergency and temporary rates approved by Orders Nos. PSC-99-1010-PCO-SU and PSC-99-1883-PAA-SU.

DOCKET NO. 980242-SU  
DATE: November 18, 1999

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No, this docket should remain open in order to conduct a hearing on the protests filed in this docket. (JAEGER)

**STAFF ANALYSIS:** This docket should remain open in order to conduct a hearing on the protests filed in this docket.