

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: November 18, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Saylor)
Division of Economic Regulation (Clapp)

RE: Docket No. 080500-WS – Application for transfer of majority organizational control of Indiantown Company Inc., holder of Certificate Nos. 387-W and 331-S in Martin County, from Postco, Inc. to First Point Realty Holdings, LLC.

(Handwritten initials and signatures)

COMMISSION CLERK

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AGENDA: 12/02/08 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\080500.RCM.DOC

Case Background

Indiantown Company, Inc. (Indiantown or utility) is a Class B water and wastewater utility company serving approximately 1,876 water customers and 1,776 wastewater customers in Martin County. The utility's 2007 annual report on file with the Commission lists gross operating revenues of \$785,676 and \$1,171,193, with a net operating loss of \$16,287 and \$14,204, for water and wastewater, respectively. The utility's service area lies in the South Florida Water Management District and is in a critical water supply problem area.

On June 2, 2008, Postco, Inc., a private corporation formed under the laws of Florida (Seller), and First Point Realty Holdings, LLC, a Delaware limited liability company (Buyer), entered into a Stock Purchase Agreement, that provided, among other matters, that the Buyer

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would purchase all of the issued and outstanding shares of the water and wastewater utility and telecommunications companies also located in Indiantown.¹

On July 15, 2008, Indiantown filed for approval of the application for the transfer of majority organization control (TMOC) from the Seller to the Buyer, and paid a filing fee in the amount of \$5,250. The Stock Purchase Agreement specifically provided that it was subject to Commission approval. The closing of the stock sale was anticipated to occur in October 2008, after all regulatory approvals have been obtained.

On August 14, 2008, Commission staff, after reviewing the TMOC application, sent a joint data request in this docket and Docket No. 080502-TP, In re: Petition for approval of transfer of controlling stock interest in ITS Telecommunications Systems, Inc., cancellation of PATS Certificate No. 7551, effective July 21, 2008, and waiver of carrier selection requirements of Rule 25-4.118, F.A.C. Staff reviewed the utility's response to the data request and the TMOC application.

On October 15, 2008, Indiantown filed with the Commission a notice of voluntary dismissal of its TMOC application and requested the return of its \$5,250 filing fee. Due to the time and resources expended by staff, Indiantown agreed that a partial refund of \$4,750 would be acceptable.

The Commission has jurisdiction pursuant to Sections 367.071 and 367.145, Florida Statutes.

¹ The stock purchase agreement involved the Indiantown water and wastewater utility, ITS Telecommunications Systems, Inc. and Arrow Communications, Inc., the telecommunication systems located in Indiantown and owned by Seller.

Issue 1: Should the Commission acknowledge the voluntary dismissal of Indiantown's application and approve a partial refund the application filing fee?

Recommendation: Yes, the voluntary dismissal of Indiantown's application should be acknowledged and a partial refund of the filing fee in the amount of \$4,750 should be approved. (Saylor, Clapp)

Staff Analysis: This was an application for the transfer of majority organization control (TMOC). On October 15, 2008, Indiantown voluntarily dismissed its application because the Buyer was unable to complete the transfer and requested the refund of its \$5,250 filing fee.²

It is a well established legal principle that a plaintiff's right to take a voluntary dismissal is nearly absolute. See e.g., Kelly v. Colston, 977 So. 2d 692, 693 (Fla. 1st DCA 2008). Once a voluntary dismissal is taken, the trial court loses jurisdiction over the matter and cannot reinstate the action for any reason. See id. Both of these legal principles have been recognized in administrative proceedings. In Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123, 1128 (Fla. 2d DCA 1993), the court concluded that "the jurisdiction of an agency is activated when the permit application is filed . . . [and] is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the fact-finding process." (emphasis in original). In this case, Indiantown voluntarily dismissed its application prior to the completion of the TMOC. The effect of Indiantown's voluntary dismissal was to divest the Commission of jurisdiction over this matter. Consistent with Commission practice, staff recommends that the Commission acknowledge the applicant's voluntary dismissal.

When a utility requests a refund of its filing fee, the request is analyzed in terms of the amount of time and work that staff has devoted to processing the docketed matter. See Order No. PSC-00-1622-FOF-SU, issued September 12, 2000, in Docket No. 000183-SU, In re: Petition for limited proceeding to recover increase in cost of meter reading data in Highlands County by Highlands Utilities Corporation. In dockets where the staff has not committed a significant amount of time and effort in processing the application, such as where only the Case Assignment and Scheduling Record (CASR) has been established, the Commission has refunded the entire application filing fee. See id.; see also Order No. 19133, issued April 12, 1988, in Docket No. 871326-SU, In re: Objection by Highlands Utilities Corporation to Notice by C & H Utilities Corporation of application to amend Certificate No. 423-S in Highlands County and application by C & H Utilities for amendment of Certificate No. 423-S (directing that the filing fee be refunded, as "[v]irtually no Commission staff time or resources had been expended on this docket"); Order No. 20717, issued February 9, 1989, in Docket No. 880830-WS, In re: objection to application of Seacoast Utilities for approval of transfer of Certificate Nos. 29-W and 29-S in Palm Beach County to Juniper Development Group (noting that Commission "practice is to refund the filing fee if no significant time and effort have been spent on a case").

² Staff may administratively dispose of withdrawals of petitions and voluntary dismissals provided that there are no pending issues that need to be addressed by the Commission regarding the filing, no request for refund of filing fee has been made, and no agency action has been taken. In this case, the dismissal cannot be handled administratively by staff because of the utility requested the return of its filing fee.

Conversely, where staff has devoted a significant amount of time in processing the docketed matter, the Commission has denied the filing fee refund. See Order No. PSC-99-1908-FOF-WU, issued September 27, 1999, in Docket No. 981343-WU, In re: Application for amendment of Certificate No. 491-W to add territory in Gulf County by Lighthouse Utilities Company, Inc. (noting staff had expended significant time processing deficiencies and completed an audit of utility's books and records); see also Order No. PSC-94-0776-FOF-WS, issued June 22, 1994, in Docket No. 931198-WS, In Re: Application for transfer of Certificates Nos. 326-W and 274-S in Volusia County from Pine Island Utility Corporation to Landis Enterprises, Inc. (noting several, major deficiencies had to be corrected, staff devoted significant time processing the deficiencies, and had completed an audit of utility's books and records). In the orders referenced above, the Commission has either granted or denied a full refund of the filing fee. Staff, however, is unaware of any instances where the Commission granted a partial refund.

In this docket, during the period between the filing of the TMOC application in July 2008 and the voluntary dismissal of that application on October 15, 2008, Commission staff expended a moderate amount of time, effort, and resources, including, but not limited to: establishing the CASR, spending several hours reviewing the application and identifying deficiencies it, sending out a data request with regards to deficiencies noted, and reviewing the utility's response to the data request.

Because staff has expended a moderate amount of time, effort, and resources in this docket, staff believes that it would be appropriate and reasonable to approve a partial refund of the filing fee in the amount of \$4,750. Moreover, staff has conferred with the utility and the utility agrees. Therefore, staff recommends that the Commission should approve a partial refund of the filing fee in the amount of \$4,750.

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Issue 2: Should the docket be closed?

Recommendation: Yes, if the Commission votes to approve staff's recommendation in Issue 1, then no further action is required and the docket should be closed. (Sayler, Clapp)

Staff Analysis: If the Commission votes to approve staff's recommendation in Issue 1, then no further action is required and the docket should be closed.