BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for limited proceeding to implement two-step increase in wastewater rates in Pasco County by Lindrick Service Corporation.	DOCKET NO. 980242-SU ORDER NO. PSC-00-0262-PCO-SU ISSUED: February 8, 2000

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER GRANTING IN PART AND DENYING IN PART THE OFFICE OF PUBLIC COUNSEL'S MOTION TO REQUIRE REFUNDS AND ORDER INITIATING SHOW CAUSE PROCEEDINGS AGAINST LINDRICK SERVICE CORPORATION

BY THE COMMISSION:

BACKGROUND

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

On February 12, 1998, Lindrick filed an 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 its 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 to 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.

Because reuse water is primarily used for irrigation and excess chlorides are detrimental to plant life, the County limits the chloride level of the water entering its reuse system. 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 percent effective immediately, and a second rate increase of 130.12 percent 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 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 17, 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 percent 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 percent 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 percent, and a Phase-II wastewater rate increase of 142.67 percent assuming no change in related party services. The second amended petition also added a proposed water rate increase of 19.05 percent 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, we approved a 59.89 percent increase in revenue for emergency rates on a temporary basis 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's calculation included the increase in plant improvements required for the interconnection and changes for operating expenses affected by the interconnection. The utility interconnected with the City on May 28, 1999.

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

Subsequent to the issuance of that Order (and prior to September 30, 1999), the utility advised our 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 our 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 (Response).

A formal hearing has been scheduled for the petitions protesting PAA Order No. PSC-99-1883-PAA-SU. This Order 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.

OPC'S MOTION FOR ORDER REQUIRING REFUNDS WITH INTEREST FOR COLLECTING UNLAWFUL RATES

On October 8, 1999, OPC filed its Motion for Order Requiring Refunds With Interest for Collecting Unlawful Rates (Motion). In

that Motion, OPC claims that both the emergency rates and the temporary rates were improperly implemented.

Although the tariffs for emergency rates were approved for service rendered on or after May 27, 1999, 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. One bill shows that the reading was for service rendered from May 24, 1999 to June 23, 1999. Therefore, the utility improperly charged a 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 states that this error has already been corrected through a credit to the customers' bills with the proper proration and interest, consistent with Rule 25-30.360, Florida Administrative Code. Further, the utility states that it has been submitting the proper reports and has never tried to hide anything. Therefore, this portion of OPC's Motion shall be granted. All refunds shall be in accordance with Rule 25-30.360, Florida Administrative Code, and shall 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 above, the utility 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. Our 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 our final disposition of when the temporary rates should have become effective.

In reviewing Order No. PSC-99-1883-PAA-SU, we note that 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.

Although the seventh ordering paragraph contains the language "that the protest period has expired," we believe 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 were approved as final agency action, and not the PAA rates.

However, the Order does state 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. 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, we were concerned at the time of our vote 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.

The language of the Order explicitly states that "in the event of a protest" the utility would be entitled to the rates on a temporary basis. The utility filed its protest on October 11, 1999 (one day prior to the last day for a timely protest). Therefore, we find that with the filing of this protest of the PAA portion of the Order, the utility was entitled to temporary rates upon its filing the appropriate tariff sheets, customer notice, and security, and upon the customers having been given notice of the rate increase. The protest was filed on October 11, 1999, and all the other conditions had been met at this time. Therefore, pursuant to our Order, the utility should not have been allowed to implement the temporary rates until October 11, 1999.

Based on all the above, the utility shall refund with interest the increased revenues associated with the utility having improperly implemented (and our 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 shall be granted in part and denied in part as set forth above. All refunds shall be made in accordance with Rule 25-30.360, Florida Administrative Code, and shall be completed within 45 days of the issuance date of the Order requiring refunds.

SHOW CAUSE PROCEEDINGS

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 us 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.

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."

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 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.

We find that the utility's act was "willful" in the sense intended by Section 367.161, Florida Statutes. Therefore, the utility shall be made to show cause why it should not be fined in accordance with Section 367.161, Florida Statutes. However, because a formal hearing has already been scheduled on the protests of the PAA portion of Order No. PSC-99-1883-PAA-SU, the issue of whether the utility should be fined for its improper implementation of the emergency and temporary rates shall be added as an issue and consolidated with the formal hearing currently scheduled. The utility shall address this issue in its testimony. Pending the resolution of the show cause proceeding and the limited proceeding, this docket shall remain open.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion for Order Requiring Refunds With Interest for Collecting Unlawful Rates is granted in part, and denied in part, as set forth in the body of this Order. It is further

ORDERED that Lindrick Service Corporation shall make refunds as set forth in the body of this Order. It is further

ORDERED that Lindrick Service Corporation shall show cause why it should not be fined in accordance with Section 367.161, Florida Statutes, for its improper implementation of emergency and temporary rates in apparent violation of Orders Nos. PSC-99-1010-PCO-SU and PSC-99-1883-PAA-SU. It is further

ORDERED that the show cause proceeding shall be consolidated with the limited proceeding of Lindrick Service Corporation now scheduled for formal hearing. It is further

ORDERED that the question of whether a fine should be imposed shall be added as an issue, and Lindrick Service Corporation shall address the issue in its prefiled testimony. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 8th day of February, 2000.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.