

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to gross-up) DOCKET NO. 920433-WU
contributions-in-aid-of-) ORDER NO. PSC-92-0958-FOF-WU
construction (CIAC) by EAST) ISSUED: 09/09/92
CENTRAL FLORIDA SERVICES, INC.)
in Brevard, Orange and Osceola)
Counties)
_____)

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

ORDER ALLOWING TARIFFS TO BECOME EFFECTIVE ON INTERIM BASIS

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. By Order No. 23541, issued October 1, 1990, we 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.

By Order No. PSC-92-0104-FOF-WU, issued March 27, 1992, in Docket No. 910114-WU, we granted East Central Florida Services, Inc., (ECFS or utility) water Certificate No. 537-W and approved service availability charges and service availability policies, whereby ECFS would receive substantial CIAC. The City of Cocoa filed a timely notice of appeal to that Order. Rule 9.310(b)(2) of the Rules of Appellate Procedure provides that an automatic stay is instituted upon a governmental entity's filing a notice of appeal. ECFS filed a Motion to Vacate Stay in Docket No. 910114-WU, and at our August 18, 1992, Agenda Conference, we granted ECFS's motion.

DOCUMENT NUMBER-DATE

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On May 12, 1992, ECFS filed a petition and tariff sheets for authority to gross-up CIAC for the related tax impact. ECFS waived the sixty-day action period of Section 367.091, Florida Statutes, for an additional 45 days.

ECFS is a class "C" water utility which provides potable and agricultural water in Brevard, Orange and Osceola Counties. Because ECFS is a new utility, it has no annual report on file with this Commission. According to its petition for gross-up authority, revenue for 1992 is projected to be \$153,216 and operating income is projected to be \$16,443.

Tariff Implementation

On May 12, 1992, ECFS filed its petition for authority to gross-up CIAC. The utility asserts that this request is necessary because of its status as a newly-certified utility. The utility asserts it commenced operations in May, 1992, with many existing customers, and the facilities in place serve those existing customers. However, the utility states that it expects to enter into future service agreements to provide potable and bulk raw water service, which will result in the receipt of substantial amounts of taxable CIAC. In order to obtain such future customers, the utility states that it will need to construct costly facilities with financing through additional construction borrowing.

The utility anticipates that prior to receipt of taxable CIAC, it will be in the position of having a regulatory above-the-line taxable income from utility operations. Unless gross-up authority is effective throughout this period, ECFS states, it will incur a substantial tax liability with no apparent source for the funding of such liability.

Although the information filed makes it appear that the utility will have a tax liability, we need additional information before we can find that a tax liability exists and that other sources of funds are not available at a reasonable cost, as discussed in Order No. 23541.

Section 367.091(5), Florida Statutes, provides that within sixty (60) days of the filing of an application to change a rate or charge other than the monthly rates for service, the Commission may withhold consent to the operations of any or all portions of the new rate schedule by a vote to that effect, giving a reason or statement of good cause for withholding consent. If the Commission does not act within 60 days, the rates or charges becomes effective.

In, Citizens of the State of Florida v. Wilson, 568 So.2d 904 (Fla. 1990), the Florida Supreme Court held that when rates become effective upon inaction by the Commission under the file-and-suspend laws provide, those rates are effective on an interim basis pending final order by the Commission and that substantially affected persons have the right to a hearing prior to final approval.

In this instance, rather than suspending, approving, or denying ECFS's tariff, we are taking no action, thereby allowing the tariff to become effective on an interim basis. If we suspended the tariff, the utility would not be able to gross-up since it has no gross-up tariff in effect presently, and, thus, would forever lose monies which it might be in need of and ultimately found entitled to at the end of our investigation. Likewise, if we denied the tariff outright, the utility would be unable to collect any CIAC gross-up and therefore lose monies it may need without our having a complete and thorough review. If we simply approved the tariff, we would be making the affirmative statement that the utility's gross-up tariff is correct as filed; and we cannot make that statement absent review. Therefore, we believe that it is appropriate to take no action on ECFS's tariff, thereby allowing it to go into effect on an interim basis pending final action. The interim charges shall be subject to refund. Thus, both the utility and the ratepayer are protected.

In accordance with Rule 25-30.360(6), Florida Administrative Code, the utility shall provide a report by the 20th of each month indicating the monthly and total revenue collected subject to refund.

Orders Nos. 16971 and 23541 examined authority for utilities to gross-up CIAC, prescribed accounting and regulatory treatment for the gross-up, and required refunds of certain gross-up amounts collected. Pursuant to these Orders, CIAC tax impact amounts shall be deposited as received in a fully funded interest bearing escrow account and the utility shall maintain adequate records to account for the receipt, deposit, and withdrawal of monies in the CIAC tax impact account. CIAC tax impact monies received during the tax year that are in excess of the utility's actual tax liability resulting from its collection of CIAC, together with interest on such excess monies shall be refunded on a pro rata basis to the contributors of those amounts. All other matters discussed in the body of those Orders are expressly incorporated herein by reference, with one exception. Although Order No. 16971 states the escrow account may be drawn upon to pay estimated taxes, we believe that because the gross-up is being allowed on an interim basis and

may not be permitted after further examination, no monies should be withdrawn from the escrow account until a final determination of the utility's authority to collect CIAC gross-up is made.

Therefore, ECFS's interim collections of the CIAC gross-up shall be made in accordance with the provisions of Orders Nos. 16971 and 23541, with the modification that no monies shall be withdrawn from the escrow account until a final determination is made.

Effective Date

ECFS's gross-up tariff will become effective on an interim basis, subject to refund, after August 26, 1992. Persons substantially affected by this tariff have the right to a hearing prior to final approval. Therefore, substantially affected persons shall have 21 days from the date of this Order to request a hearing.

Based upon the foregoing, it is, therefore

ORDERED by the Florida Public Service Commission that this Commission takes no action on the tariff for CIAC gross-up collections filed by East Central Florida Services, Inc., thereby allowing said tariff to become effective on an interim basis. It is further

ORDERED that interim collections of the CIAC gross-up shall be subject to refund with interest as set forth in the body of this Order. It is further

ORDERED that the interim collections of the CIAC gross-up shall be made in accordance with the provisions of Orders Nos. 16971 and 23541 with the exception that no monies shall be withdrawn from the escrow account until a final determination is made. It is further

ORDERED that East Central Florida Services, Inc., shall provide, in accordance with Rule 25-30.360(6), Florida Administrative Code, a report by the 20th of each month indicating the monthly and total revenue collected subject to refund. It is further

ORDERED that substantially affected persons shall have 21 days from the date of this Order to request a hearing.

By ORDER of the Florida Public Service Commission this 9th day
of September, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MJF

by: Kay Hagan
Chief, Bureau of Records

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.

The Commission's decision on this tariff is interim in nature and may become final, unless a person whose substantial interests are affected by the action proposed files a petition for a formal proceeding, as provided by Rule 25-22.036(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a)(d) and (e), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on September 30, 1992.

Any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the date this Order becomes final, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.