

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Disposition of gross-up ) DOCKET NO. 961263-SU  
funds collected by North Fort ) ORDER NO. PSC-97-0062-FOF-SU  
Myers Utility, Inc. in Lee ) ISSUED: January 17, 1997  
County )  
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The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman  
J. TERRY DEASON  
JOE GARCIA  
JULIA L. JOHNSON  
DIANE K. KIESLING

NOTICE OF PROPOSED AGENCY ACTION  
ORDER ON DISPOSITION OF CIAC GROSS-UP FUNDS

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

North Ft. Myers Utility, Inc. (NFMU or utility) is a Class A wastewater utility providing service to approximately 4,966 customers in Lee County. According to its 1995 annual report, the utility reported gross operating revenues of \$1,493,279 and a net operating loss of \$131,325.

As a result the repeal of Section 118(b) of the Internal Revenue Code, contributions-in-aid-of-construction (CIAC) became gross income and were depreciable for federal tax purposes. By Order No. 16971, issued December 18, 1986, we authorized corporate utilities to collect the gross-up on CIAC in order to meet the tax impact resulting from the inclusion of CIAC as gross income.

Order Nos. 16971, issued December 18, 1986, and 23541, issued October 1, 1990, require that utilities annually file information which would be used to determine the actual state and federal income tax liability directly attributable to the CIAC. The information would also determine whether refunds of gross-up would be appropriate. These orders require that all gross-up collections

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for a tax year, which are in excess of a utility's actual tax liability for the same year, should be refunded on a pro rata basis to those persons who contributed the taxes.

By Order No. 23541, this Commission required water and wastewater utilities that wished to continue collecting gross-up on CIAC to file a petition for approval. By Order No. 25532, issued December 24, 1991, we granted NFMU authority to continue to gross-up using the full gross-up formula. By Order No. PSC-92-0130-FOF-WS, issued March 31, 1992, we granted Sunray authority to continue to gross-up using the full gross-up formula. On September 9, 1992, this Commission issued Proposed Agency Action Order No. PSC-92-0961-FOF-WS, which clarified the provisions of Orders Nos. 16971 and 23541 for the calculation of refunds of gross-up of CIAC. Order No. PSC-92-0961A-FOF-WS, issued on September 14, 1992, set forth the generic calculation form.

By Order No. PSC-96-0686-FOF-WS, issued May 24, 1996, we directed our staff to continue processing CIAC gross-up and refund cases pursuant to Order Nos. 16971 and 23541. We also determined that further study of the policy and possible alternatives should be pursued. However, The Small Business Job Protection Act of 1996 (The Act) signed into law on August 20, 1996, significantly changed the treatment of CIAC. The Act provided for the non-taxability of CIAC collected by water and wastewater utilities effective retroactively for amounts received after June 12, 1996. As a result, on September 20, 1996, in Docket No. 960965-WS, by Order No. PSC-96-1180-FOF-WS, we revoked the authority of utilities to collect gross-up of CIAC and canceled the respective tariffs unless affected utilities requested a variance.

#### DISPOSITION OF CIAC GROSS-UP FUNDS FOR 1992 AND 1993

As established in Order No. PSC-96-0686-FOF-WS, all pending CIAC gross-up refund cases shall be processed pursuant to Order Nos. 16971 and 25341. In compliance with Orders Nos. 16971 and 23541, NFMU filed its 1992 and 1993 annual CIAC reports regarding its collection of gross-up for each year. We calculated the gross-up required to pay the tax liability resulting from the collection of taxable CIAC by grossing-up the net taxable CIAC amount, in accordance with the method adopted in Order No. PSC-92-0961-FOF-WS.

NFMU's 1992 CIAC report indicated that the utility was in a taxable position on an above-the-line basis prior to the inclusion of taxable CIAC and gross-up. Therefore, all of the taxable CIAC received would be taxed. The report indicated a total of \$1,129,778 in taxable CIAC for that year, with \$5,794 being deducted for the first year's depreciation. Using the 37.63 percent

combined marginal federal and state tax rates as provided in the 1992 CIAC Report to calculate a tax effect of \$422,955. When this amount is multiplied by the expansion factor for gross-up taxes, the amount of gross-up required to pay the tax effect on the CIAC is \$678,139. The utility collected \$563,410 of gross-up monies. Because the utility required more in gross-up to pay the tax impact than the utility collected, we conclude that no refund is necessary.

As to 1993, the utility received taxable CIAC of \$409,690. We deducted \$20,008 for the first year's depreciation, resulting in net taxable CIAC of \$389,682. The utility's 1993 CIAC report indicated that the utility operated at a loss before the inclusion of CIAC in income. Order No. 23541 requires that CIAC income be netted against the above-the-line loss; therefore, not all of the CIAC collected would create a tax liability. When CIAC in the amount of \$389,682 is netted against the calculated loss of \$56,189, the amount of taxable CIAC resulting in a tax liability is \$333,493. We used the 37.63 percent combined marginal federal and state tax rates as provided in the 1993 CIAC Report to calculate net income taxes of \$125,493. When this amount is multiplied by the expansion factor for gross-up taxes, the amount of gross-up required to pay the tax effect on the CIAC is calculated to be \$201,207. The utility collected \$191,017 of gross-up monies. The utility required more in gross-up to pay the tax impact than the utility collected. Therefore, we conclude that no refund is necessary for 1993.

In its filing, the utility did not make a deduction for first year's depreciation, and indicated that it did not believe that first year's depreciation should be deducted. We were not persuaded by the utility's argument. Depreciation is an allowable deduction for federal tax purposes, which the utility claimed on its federal tax returns in determining taxable income. Depreciation is an integral part of the determination of taxable income, which should be calculated by reducing the amount of taxable CIAC collected in each year by the amount of first year's depreciation deduction taken by the utility. By definition, CIAC charges are intended for plant and are to be utilized for the acquisition, or construction of utility property, and therefore, the CIAC collected will be converted into property and, thus, depreciated. To the extent that cash CIAC is used and useful, first year's depreciation exists because the cash either pays for a prior investment made by the utility or it provides for new plant in the year it is received by the utility. Based on the foregoing, first year's depreciation was included in our calculation of the net taxable amount of CIAC.

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If a timely protest is not filed by a substantially affected person within the protest period set forth below, this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that North Fort Myers Utilities, Inc., is not required to refund any CIAC gross-up funds collected in 1992 and 1993. It is further

ORDERED that the provisions of this Order issued as proposed agency action shall become final, unless an appropriate petition in the form provided by Rule 25-22.029, Florida Administrative Code, is received by the Director of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida, 32399-0863, by the date set forth in the Notice of Further Proceedings below.

By ORDER of the Florida Public Service Commission, this 17th day of January, 1997.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

by: Kay Flynn  
Chief, Bureau of Records

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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.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 7, 1997.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially 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 effective date of this order, 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.