

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Disposition of) DOCKET NO. 930216-WS
Contributions-in-Aid-of-) ORDER NO. PSC-93-0871-FOF-WS
Construction (CIAC) Gross-Up) ISSUED: June 9, 1993
Funds Received by GULF UTILITY)
COMPANY in Lee County.)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
THOMAS M. BEARD
SUSAN F. CLARK
JULIA L. JOHNSON
LUIS J. LAUREDO

NOTICE OF PROPOSED AGENCY ACTION
ORDER REQUIRING REFUND

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 adversely affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Background

The repeal of Section 118(b) of the Internal Revenue Code (IRC) resulted in making contributions-in-aid-of-construction (CIAC) gross income and depreciable for federal tax purposes. By Order No. 16971, issued December 18, 1986, this Commission authorized corporate utilities to collect a CIAC tax gross-up in order for those utilities to pay the tax liability resulting from their receipt of CIAC.

In Order No. 23541, issued October 1, 1990, we ordered all water and wastewater utilities which were collecting the CIAC tax gross-up and which wanted to continue do so to file a petition for approval of same on or before October 29, 1990. Gulf Utility Company (Gulf or utility) filed a petition, and by proposed agency action (PAA) Order No. PSC-92-0742-FOF-WS, issued July 30, 1992, we proposed authorizing Gulf to continue to gross-up. However, Southwest Florida Capital Corporation protested that Order, so that matter proceeded to an administrative hearing. Since no final decision has been made in that case, the question of whether Gulf will be allowed to collect the gross-up on a prospective basis is yet to be resolved.

DOCUMENT NUMBER-DATE

06213 JUN-93

11-00-REGULATORY REPORTING

By Orders Nos. 16971 and 23541, we required utilities which gross-up to file annually the information needed for (1) a determination of the utility's state and federal income tax liability directly attributable to receipt of CIAC for that year and (2) a determination of whether a refund of gross-up charges collected that year is appropriate. These orders required that a utility refund on a pro rata basis the gross-up charges collected each year which exceeded the utility's actual above-the-line tax liability attributable to CIAC for the same year.

By PAA Order No. PSC-92-0961-FOF-WS, issued September 9, 1992, as amended by Order No. PSC-92-0961A-FOF-WS, issued September 14, 1992, we clarified the refund calculation provisions of Orders Nos. 16971 and 23541. No protest to that PAA Order was filed, so the action taken therein became final.

Gulf is a class A utility providing water and wastewater service in Lee County. According to its 1991 annual report, Gulf had \$1,484,296 in operating revenue and \$44,650 in net operating income for its water system and had \$660,570 in operating revenue and \$44,650 in net operating income for its wastewater system.

Refund Calculations For Years 1987 Through 1991

In compliance with Order No. 16971, Gulf filed annual CIAC gross-up reports for 1987 through 1991. By letter dated April 10, 1991, Gulf amended its CIAC reports for 1987, 1988 and 1989. In response to some of our staff's preliminary refund calculations sent to Gulf on March 1, 1993, Gulf submitted copies of a special report containing Gulf's proposed refund calculation on April 7, 1993. Our calculations are reflected on Schedule No. 1, which is attached hereto and by reference incorporated herein. Our calculations differ with Gulf's in two respects.

First, in calculating net taxable CIAC, Gulf reduced the amount of taxable CIAC by the first year's depreciation only for years where there was above-the-line income exclusive of CIAC and gross-up. If there was an above-the-line loss, Gulf included the first year's depreciation in the loss, but did not subtract it from taxable CIAC to compute net taxable CIAC, apparently on the theory that the loss already included a reduction for the depreciation.

We believe it is appropriate to separately account for the first year's depreciation on taxable CIAC when calculating above-the-line income or loss, thus excluding all effects of gross-up

from that calculation, and to subtract the first year's depreciation from taxable CIAC when calculating the amount of net taxable CIAC. This is done so we can isolate the above-the-line income or loss as if CIAC gross-up were not a factor. The full gross-up formula, which Gulf used for the years in question, takes into account the first year's depreciation using a half-year convention. Depreciation is an expense which reduces the amount of taxable CIAC and the amount of taxes due.

We note that our calculation of net taxable CIAC agrees with Gulf's for each year except 1988. For that year, Gulf shows an above-the-line loss of \$76,885. That amount, however, includes \$99,700 in first year depreciation associated with taxable CIAC. As is shown in our calculation on Schedule No. 1, Gulf would have \$22,815 in above-the-line income when depreciation is added in. Therefore, no reduction to the amount of taxable CIAC should be made in 1988 for an above-the-line loss.

Our second disagreement with Gulf's calculations concerns the tax rate. Gulf used a combined effective state and federal tax rate which it calculated from its returns. By Order No. PSC-92-0961-FOF-WS, we adopted, and we have consistently used, the combined federal and state tax rates, and not combined effective tax rates. We have used the combined state and federal rates since the net amount of taxable CIAC will in fact be taxed at the combined rates and not at the effective rates.

We note that Gulf's proposed effective tax rates are higher than the combined federal and state tax rates for each year except 1987. In 1987, the federal tax rate was 46% for the first six months and 34% for the last six months. We calculated the average of the two combined federal and state rates and arrived at a combined federal and state tax rate of 43.3%; Gulf's effective federal and state rate for 1987 was 42.10%.

According to Order No. 23541, all gross-up amounts in excess of a utility's actual tax liability resulting from its collection of CIAC in a year should be refunded on a pro rata basis to those persons who paid the gross-up that year. According to our calculations, Gulf has a refund obligation for each year, 1987-1991. A summary of each year's calculation follows.

1987

The utility calculated a \$18,624 refund for 1987; we calculated a \$5,708 refund. The 1987 CIAC report indicates that a total of \$275,502 of gross-up charges were collected and that the first year's depreciation on CIAC was \$7,479. The utility had an above-the-line loss of \$100,334 prior to consideration of taxable CIAC and associated depreciation. We reduced the amount of taxable CIAC to account for this above-the-line loss and used the 43.30% combined federal and state tax rates to calculate the net income tax on CIAC. We then compared the gross-up required to pay the tax to the gross-up charges collected. The \$5,708 difference is the amount of the refund. The amount does not include the accrued interest from December 31, 1987, to the date of refund which must also be refunded.

1988

The utility calculated a \$26,658 refund for 1988; we calculated a \$49,212 refund. The 1988 CIAC report indicates that a total of \$1,407,307 of gross-up charges were collected and that the first year's depreciation on CIAC was \$99,700. Gulf had above-the-line income of \$22,815 for the year. We used the 37.63% combined federal and state tax rates to calculate the net income tax on CIAC. We then compared the gross-up required to pay the tax to the gross-up charges collected. The \$49,212 difference is the amount of the refund. The amount does not include the accrued interest from December 31, 1988, to the date of refund which must also be refunded.

1989

The utility calculated a \$37,670 refund for 1989; we calculated a \$45,309 refund. The 1989 CIAC report indicates that a total of \$1,328,581 of gross-up charges were collected and that the first year's depreciation on CIAC was \$39,437. Gulf had above-the-line income of \$192,702 for the year. We used the 37.63% combined federal and state tax rates to calculate the net income tax on CIAC. We then compared the gross-up required to pay the tax to the gross-up charges collected. The \$45,309 difference is the amount of the refund. The amount does not include the accrued interest from December 31, 1989, to the date of refund which must also be refunded.

1990

The utility calculated a \$25,677 refund for 1990; we calculated a \$32,462 refund. The 1990 CIAC report indicates that a total of \$1,021,526 of gross-up charges were collected and that the first year's depreciation on CIAC was \$60,146. Gulf had above-the-line income of \$120,292 for the year. We used the 37.63% combined federal and state tax rates to calculate the net income tax on CIAC. We then compared the gross-up required to pay the tax to the gross-up charges collected. The \$32,462 difference is the amount of the refund. This amount does not include the accrued interest from December 31, 1990, to the date of refund which must also be refunded.

1991

The utility calculated a \$114,402 refund for 1991; we calculated a \$120,447 refund. The 1991 CIAC report indicates that a total of \$665,291 of gross-up charges were collected and that the first year's depreciation on the CIAC was \$24,630. The utility had an above-the-line loss of \$177,642 prior to consideration of taxable CIAC and associated depreciation. We reduced the amount of taxable CIAC to account for this above-the-line loss and used the 37.63% combined federal and state tax rates to calculate the net income tax on CIAC. We then compared the gross-up required to pay the tax to the gross-up charges collected. The \$120,447 difference is the amount of the refund. This amount does not include the accrued interest from December 31, 1991, to the date of refund which must also be refunded.

Conclusion

Based upon the foregoing, Gulf is hereby required to refund on a pro rata basis to all persons who paid gross-up charges in a given year \$5,708 for 1987, \$49,212 for 1988, \$45,309 for 1989, \$32,462 for 1990, and \$120,447 for 1991, plus accrued interest through the date of the refund. The refunds must be completed within six months of the date of this Order. Gulf shall submit copies of canceled checks, bills which have had credits applied to them, or other evidence which verifies that the refunds have been made within 30 days of completion of the refund.

Based on the foregoing, it is, therefore

ORDERED by the Florida Public Service Commission that the provisions of this Order are issued as proposed agency action and 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 the Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the date set forth in the Notice of Further Proceedings below. It is further

ORDERED that, as set forth hereinabove, Gulf Utility Company is hereby required to refund on a pro rata basis to all persons who paid gross-up charges in a given year \$5,708 for 1987, \$49,212 for 1988, \$45,309 for 1989, \$32,462 for 1990, and \$120,447 for 1991, plus accrued interest from the date of collection through the date of the refund. It is further

ORDERED that the refunds required herein must be completed within six months of the date of this Order and that Gulf Utility Company shall submit copies of canceled checks, bills which have had credits applied to them, or other evidence verifying that the refunds have been made within 30 days of completion of the refund. It is further

ORDERED that all matters contained in the schedule attached hereto are by reference incorporated herein. It is further

ORDERED that the docket will be closed upon expiration of the protest period if no timely protest is filed.

By ORDER of the Florida Public Service Commission this 9th day of June, 1993.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MJF

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 at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on June 30, 1993.

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 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 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.

SCHEDULE NO. 1

GULF UTILITY COMPANY
SOURCE: (Line references are from CIAC Reports)

COMMISSION CALCULATED GROSS-UP REFUND

	1987	1988	1989	1990	1991
1 Form 1120, Line 30 (Line 15)	\$ 633,346	\$ 3,364,665	\$ 3,482,926	\$ 2,238,372	\$ 1,092,219
2 Less CIAC (Line 7)	(461,100)	(2,350,680)	(2,166,402)	(1,699,474)	(1,105,326)
3 Less Gross-up collected (Line 19)	(275,502)	(1,407,307)	(1,328,581)	(1,021,526)	(665,291)
4 Add First Year's Depr on CIAC (Line 8)	7,479	99,700	39,437	60,146	24,630
5 Add/Less Other Effects (Lines 20 & 21)	(4,557)	316,437	165,322	542,774	476,126
6					
7 Adjusted Income Before CIAC and Gross-up	\$ (100,334)	\$ 22,815	\$ 192,702	\$ 120,292	\$ (177,642)
8					
9 Taxable CIAC (Line 7)	\$ 461,100	\$ 2,350,680	\$ 2,166,402	\$ 1,699,474	\$ 1,105,326
10					
11 Taxable CIAC Resulting in a Tax Liability	\$ 360,766	\$ 2,350,680	\$ 2,166,402	\$ 1,699,474	\$ 927,684
12 Less first years depr. (Line 8)	(7,479)	(99,700)	(39,437)	(60,146)	(24,630)
13					
14 Net Taxable CIAC	\$ 353,287	\$ 2,250,980	\$ 2,126,965	\$ 1,639,328	\$ 903,054
15 Effective state and federal tax rate	43.30%	37.63%	37.63%	37.63%	37.63%
16					
17 Net Income tax on CIAC	\$ 152,973	\$ 847,044	\$ 800,377	\$ 616,879	\$ 339,819
18 Less ITC Realized	0	0	0	0	0
19					
20 Net Income Tax	\$ 152,973	\$ 847,044	\$ 800,377	\$ 616,879	\$ 339,819
21 Expansion Factor for gross-up taxes	1.763668430	1.603334936	1.603334936	1.603334936	1.603334936
22					
23 Gross-up Required to pay tax effect	\$ 269,794	\$ 1,358,095	\$ 1,283,272	\$ 989,064	\$ 544,844
24 Less CIAC Gross-up collected (Line 19)	(275,502)	(1,407,307)	(1,328,581)	(1,021,526)	(665,291)
25					
26 PROPOSED REFUND (excluding interest)	\$ (5,708)	\$ (49,212)	\$ (45,309)	\$ (32,462)	\$ (120,447)
27					
28					
29 TOTAL REFUND	\$ (253,138)				
30					