

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Disposition of  
contribution-in-aid-of-  
construction gross-up funds  
collected by Forest Utilities,  
Inc. in Lee County

DOCKET NO. 961237-SU  
ORDER NO. PSC-97-0648-FOF-SU  
ISSUED: June 6, 1997

The following Commissioners participated in the disposition of  
this matter:

SUSAN F. CLARK  
J. TERRY DEASON  
JOE GARCIA

NOTICE OF PROPOSED AGENCY ACTION ORDER ACCEPTING SETTLEMENT OFFER  
AND REQUIRING REFUNDS

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

As a result of 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. In  
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.

Orders Nos. 16971 and 23541, issued December 18, 1986 and  
October 1, 1990, respectively, 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 also required that all gross-up  
collections 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.

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FPSC-RECORDS/REPORTING

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In Order No. 23541, we required any water and wastewater utility already collecting the gross-up on CIAC and wishing to continue, to file a petition for approval with the Commission on or before October 29, 1990. On December 27, 1990, pursuant to Order No. 23541, Forest Utilities, Inc. (Forest or Utility) filed for authority to continue to gross-up CIAC. Order No. 25299, issued November 5, 1991, granted Forest authority to gross-up CIAC using the full gross-up formula.

On September 9, 1992, we issued Proposed Agency Action (PAA) Order No. PSC-92-0961-FOF-WS, which clarified the provision of Orders Nos. 16971 and 23541 for the calculation of refunds of gross-up of CIAC. On September 14, 1992, we issued PAA Order No. PSC-92-0961A-FOF-WS. This order included Attachment A which reflected the generic calculation form. No protests were filed, and the Order became final.

On March 29, 1996, we opened Docket No. 960397-WS to review our policy concerning the collection and refund of CIAC gross-up. Workshops were held and comments and proposals were received from the industry and other interested parties. By PAA Order No. PSC-96-0686-FOF-WS, issued May 24, 1996, we directed our staff to review the proposals and comments offered by the workshop participants and make a recommendation concerning whether our policy regarding the collection and refund of CIAC should be changed. In addition, we directed our staff to consider ways to simplify the process and determine whether there were viable alternatives to the gross-up. Pending this review, we directed our staff to continue processing CIAC gross-up and refund cases pursuant to Orders Nos. 16971 and 23541.

However, on August 1, 1996, Congress passed the Small Business Job Protection Act of 1996 (the Act), and the President signed the Act on August 20, 1996. 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, we issued Order No. PSC-96-1180-FOF-WS revoking the authority of utilities to collect gross-up of CIAC and cancelling the respective tariffs unless, within 30 days of the issuance of the order, affected utilities requested a variance. Since there was no longer a need to review our policy on the gross-up of CIAC, we closed Docket No. 960397-WS by Order No. PSC-96-1253-FOF-WS, issued on October 8, 1996. However, as established in PAA Order No. PSC-96-0686-FOF-WS,

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all pending CIAC gross-up refund cases are being processed pursuant to Orders Nos. 16971 and 23541.

By PAA Order No. PSC-97-0007-FOF-SU, issued on January 2, 1997, we proposed to require Forest to refund \$3,372 for 1990, \$2,183 for 1991, \$16,496 for 1993, and \$3,287 for 1994. Also, we proposed to require Forest to credit \$549 to CIAC for 1992. However, on January 17, 1997, Forest filed a timely protest of the referenced order, and the matter was set for a July 10 - 11, 1997, hearing. Subsequently, on April 23, 1997, to avoid the time and expense of further litigation in this docket, Forest, along with three other utilities, submitted a settlement proposal. To give the Commission panel assigned to this docket time to consider this settlement offer, the July 10 - 11, 1997, hearing was cancelled. The purpose of this PAA Order is to address this settlement offer and the disposition of gross-up funds collected by the utility for the years 1990 through 1995.

#### SETTLEMENT OFFER

In compliance with Order No. 16971, Forest filed its annual CIAC report regarding its collection of gross-up for 1990 through 1995. As previously stated, by PAA Order No. PSC-97-0007-FOF-SU, issued on January 2, 1997, we proposed to require a refund of \$3,372 for 1990, \$2,183 for 1991, \$16,946 for 1993 and \$3,287 for 1994, and to credit \$549 to CIAC for 1992. On January 17, 1997, Forest filed a timely protest of the Order, and the matter was set for hearing.

The utility's protest concerned the following two issues: (1) whether the amount of the contributor's refund should be reduced by the amount of legal and accounting costs associated with the preparation and filing of the utility's gross-up reports (these costs totalled \$2,248 for 1990, \$2,518 for 1991, \$2,070 for 1992, \$4,511 for 1993, \$2,692 for 1994 and \$2,568 for 1995); and (2) how much of the Officer and Employee Salaries Expense for the years 1990 through 1995 should be classified as above the line. Pursuant to the PAA Order, those salaries totalled \$894,724 above-the-line as follows: 1990 -- \$98,529; 1991 -- \$121,004; 1992 -- \$161,619; 1993 -- \$162,609; 1994 -- \$175,259 and 1995 -- \$175,664. These are the amounts that were reported on the utility's tax return for those years. However, the utility classified only \$757,776 above-the-line as follows: 1990 -- \$93,729; 1991 -- \$111,369; 1992 -- \$133,378; 1993 -- \$129,994; 1994 -- \$142,643 and 1995 -- \$145,664. The utility classified the remaining \$137,948 below-the-line.

We found in PAA Order No. PSC-97-0007-FOF-SU, that the legal and accounting costs associated with the preparation and filing of the utility's gross-up reports should not be offset against the contributor's refund. Further, we found that the full amount of officer's and employees salaries of \$894,724 should appropriately be classified above-the-line.

On March 7, 1997, a meeting was held at the request of the utility to discuss the utility's settlement proposal to offset the legal and accounting fees incurred in preparing the CIAC gross-up reports with the contributors' refund amount. On April 23, 1997, the utility submitted its proposed offer of settlement, whereby it proposed that 50 percent of the legitimate legal and accounting fees incurred for any one year for the CIAC gross-up process be offset against any refund calculated to be due in that same year. As a part of the offer, the utility agreed to waive several other issues as to the PAA calculation of refunds in exchange for acceptance of its proposed recognition of the offset of 50 percent of net legal and accounting expenses with the calculated refund amount. The amount of the legal and accounting expense offset is limited to the amount of refund for the period.

In PAA Order No. PSC-97-0007-FOF-SU, the refund amounts for 1990 through 1994 were calculated to be \$3,372, \$2,183, \$549, \$16,946 and \$3,287, respectively. The net amount of legitimate legal and accounting expenses for 1990 through 1994 was determined to be \$2,284, \$2,518, \$2,070, \$4,511 and \$2,692, respectively. Fifty percent of each of these amounts is \$1,124, \$1,259, \$1,035, \$2,256 and \$1,346, respectively. When 50 percent of the legal and accounting expense is offset against the ordered refund amount, the revised refund amount is calculated to be \$2,248 for 1990, \$924 for 1991, \$14,946 for 1993 and \$1,941 for 1994. Since the refund for 1992 totalled only \$549, only \$549 of the legal and accounting expenses were offset against the refund. As a result, no refund is required for 1992. The refund for 1995 did not change as a result of the settlement proposal; therefore, pursuant to PAA Order No. PSC-97-0007-FOF-SU, no refund is required for 1995.

We believe the utility's settlement proposal is a reasonable "middle ground" that effectively gives the utility an offset substantially less than that which it had originally proposed, both for this adjustment and other adjustments that the utility has agreed to forego for the purposes of attempting to negotiate a settlement. Therefore, while not adopting the utility's position, we find it appropriate to accept Forest's settlement proposal.

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Therefore, the utility shall refund the amounts set out above. The refunds shall be completed within 6 months of the effective date of this PAA Order. Within 30 days from the date of the refund, the utility shall submit copies of cancelled checks, credits applied to the monthly bills or other evidence that verifies that the utility has made the refunds. Within 30 days from the date of the refund, the utility shall also provide a list of unclaimed refunds detailing the contributor and amount, and an explanation of the efforts made to make the refunds.

CLOSING DOCKET

Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, this docket shall remain open pending completion and verification of the refunds. Upon verification that the refunds have been made, the docket shall be closed administratively.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Settlement Offer of Forest Utilities, Inc., shall be accepted. It is further

ORDERED that, pursuant to the Settlement Offer, Forest Utilities, Inc., shall refund contributions-in-aid-of-construction gross-up funds in the amount of \$2,248 for 1990, \$924 for 1991, \$14,946 for 1993 and \$1,941 for 1994. It is further

ORDERED 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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" below. It is further

ORDERED that no refund is required for the years 1992 and 1995. It is further

ORDERED that Forest Utilities, Inc., shall refund accrued interest as of December 31st of each respective year, through the date of the refund, for gross-up collected in excess of the above-the-line tax liability resulting from the collection of taxable CIAC. It is further

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ORDERED that, pursuant to Orders Nos. 16971 and 23541, all amounts shall be refunded on a pro rata basis to those persons who contributed the funds. It is further

ORDERED that the refunds required herein shall be completed within six months of the effective date of this Order, and that Forest Utilities, Inc., shall submit copies of canceled checks, credits applied to monthly bills, or other evidence verifying that the refunds have been made within 30 days of completion of the refund. It is further

ORDERED that within 30 days of completion of the refund, Forest Utilities, Inc., shall provide a list of unclaimed refunds detailing the contributor and the amount, and an explanation of the efforts made to make the refunds. It is further

ORDERED that the docket shall be administratively closed upon expiration of the protest period, if no timely protest is filed, and upon our staff's verification that the refunds have been made.

By ORDER of the Florida Public Service Commission, this 6th day of June, 1997.

  
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BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

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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.

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 June 27, 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

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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.