

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Order to Show Cause)
North Fort Myers, Utility, Inc.)
Concerning Implementation of)
Price Indexes)
_____)

Docket No. 971179-SU

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RESPONSE TO SHOW CAUSE

COMES NOW, North Fort Myers Utility, Inc. (hereinafter "NFMU" or "Utility"), by and through its undersigned counsel and hereby files this response to the Show Cause portion of the Commission's Order No. PSC-99-1068-PAA-SU which required that the Utility show cause why it should not be fined for improper implementation of indexes "in apparent violation" of Section 367.081(4), Florida Statutes. It is the Utility's contention that it has not violated this statutory, or any other statutory provisions, Commission policy or rule and that the proposed fine is therefore inappropriate and unreasonable, and in support thereof states as follows:

1. The Utility's initial filing for disposition of gross-up for the fiscal years ended May 31, 1995 and May 31, 1996 were in conformance with those previously filed by the Utility for approximately 10 years and which were approved by the Commission in several orders, including most recently Order No. PSC-97-0062-FOF-SU issued on January 17, 1997.

2. The Utility filed indexes for several calendar years corresponding to the period of time during which previous gross-up

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reports were approved, up to and including the last index filed by the Utility for calendar year 1996, tariffs for which were approved by the Commission on August 19, 1997.

3. Up until late 1997, neither the Commission nor its staff ever raised the issue of whether the Utility had improperly filed its annual reports or indexes and, in fact, for 8 years the Commission staff processing those gross-up reports specifically recognized the distinction between what was filed in the Utility's annual report and what was proposed for gross-up purposes as above and below-the-line expenses.

4. It is only as a result of the dramatic change in policy which occurred in this docket and related to these last two gross-up years that this alleged violation by North Fort Myers has arisen. Therefore, any "violation" based upon the above facts, is the result of a change in the Commission's policy that has suddenly interpreted these adjustments by the Utility to constitute "improperly filed annual reports" and "improperly filed indexes," rather than any action on the part of the Utility.

5. The Utility has, throughout this proceeding contended that the annual reports as originally filed were correct and that the indexes as filed were therefore correct, and not "improperly implemented," or "based on inaccurate operating costs."

6. The Utility has maintained throughout this proceeding that the costs classified as "below-the-line" are below-the-line for gross-up purposes either because they have never been recognized by the Florida Public Service Commission in rate setting, and are therefore funded by the shareholders of the Utility rather than the ratepayers, or because they relate to "non-used and useful" plant and facilities which the shareholders of the Utility are therefore funding by definition.

7. In addition, the Utility has maintained throughout that there is a distinction between what should be considered above and below-the-line for gross-up, versus rate setting, and regulatory reporting purposes.

8. In order to accomplish the type of separation of above and below-the-line operating expenses that the Commission's Order would suggest is required of all Utilities in annual reporting and indexing, implies that each Utility Company regulated by the Florida Public Service Commission should do a detailed analysis of all operation and maintenance expenses, plant, accumulated depreciation, CIAC, and all other components of rate base, operating costs, and revenues, and thereafter estimate what the PSC would likely consider below-the-line for rate setting purposes in each of its annual reports, and report all such expenses as below-the-line. Not only is such a proposal tantamount to requiring each

Utility to do a detailed rate analysis at substantial cost with the filing of each annual report, but at best any such analysis required of the Utility would be very speculative and unprecedented.

9. No Utility to the knowledge of either the undersigned counsel to the Utility, or the Utility's accountant, has even performed this type of detailed analysis in the preparation of its annual report, or as a precondition to calculating its index adjustments. Consequently, the Commission has never proposed to fine a Utility for such an alleged "violation."

10. There is no requirement in Section 367.081(4), any other statutory provision, rule or order of the Commission that states that the Utility undertake the analysis implied by the Commission's Order and discussed in paragraph 4 hereof as a precondition to filing an index adjustment.

11. The requirements of Order No. PSC-99-1068-PAA-SU in its show cause provisions raises several issues of material fact. Included among these are:

- (A) Whether the Utility improperly implemented three price indexes for the years 1995, 1996 and 1997.
- (B) Whether the indexes filed by the Utility for the years 1995, 1996 and 1997 were based on inaccurate operating costs.
- (C) Whether the requirements of Order No. 23541 specifically recognized a distinction between a Utility's

operating costs for gross-up purposes and for all rate setting purposes, including indexing.

- (D) Whether the operating costs of the Utility as originally reported in its annual report constitute the actual Utility's operating costs as required to be reported under Commission Rule 25-30.110(9), Florida Administrative Code.
- (E) Whether any Utility has ever been required to meet the requirements of separately analyzing all operation and maintenance expenses, revenues, and rate base components in applying for an index rate increase as proposed in the show cause provisions of Order No. PSC-99-1068-PAA-SU.
- (F) Whether the Commission's proposed treatment of gross-up in this proceeding represents a change in policy.
- (G) Whether the Commission's proposed treatment of gross-up in this proceeding, and specifically, in Order No. PSC-99-1068-PAA-SU constitutes a change in policy which varies from that previously utilized in approving gross-up disposition proposed by NFMU in its 8 years of previous gross-up filings approved by the Commission.
- (H) Whether the Commission's proposal for the calculations required within the annual reports of NFMU as outlined in Order No. PSC-99-1068-PAA-SU, constitutes a substantial change in policy from those inherent in previous annual report, index and gross-up filings submitted by NFMU between 1987 and 1995.
- (I) Whether the Commission's proposed treatment of indexes and findings related to the appropriateness of the indexes filed by NFMU represents a change in policy from the treatment previously afforded to this and other Utilities for index filings prior to 1997.

12. The Utility contends that there are numerous issues of law including, but not limited to, the following:

- (A) Whether the Utility has complied with all the requirements of Section 367.081(4), Florida Statutes in the filing of its 1995, 1996 and 1997 indexes.
- (B) Whether the Utility's annual reports as filed complies with the requirements of the provisions of Commission Rule 25-30.110, Florida Administrative Code and Section 367.081(4), Florida Statutes.

13. The Utility did not agree that the revisions to the annual report, or the revisions to the index adjustment were appropriate. In fact, when NFMU submitted revised pages to its annual report, we clearly stated this in the accompanying letter. The Utility has however, through its previous correspondence with the Commission staff and through its failure to protest Order No. PSC-99-1068-PAA-SU, indicated that it is willing to accept the proposals outlined in that Order and forgo a protest and full hearing on these issues related to gross-up and indexing in order to avoid the substantial additional costs related thereto and to resolve this matter related to gross-up once and for all.

WHEREFORE, NORTH FORTH MYERS UTILITY, INC. contends that based upon the above facts, the Utility should not be fined for the alleged violations of Section 367.081(4), Florida Statutes since the Utility is not in violation of those provisions of the Florida Statutes. The alleged violation is the result of a change in

Commission policy in reviewing gross-up, annual report and index filings and contrary to 8 years of findings by this Commission on previous filings by this Utility. To the extent that the Commission ultimately finds that a violation did occur, the fact that no Utility has ever been required to perform the type of analysis that is proposed for this Utility in complying with that statutory provision, a fine of any amount, much less \$5,000 per incident is clearly excessive and must be reduced. North Fort Myers Utility, Inc. contends that it is not in violation of any provision of Commission Rule, Statute or Order and to the extent the Commission determines that such violation exists, requests a hearing pursuant to the provisions of Chapter 120.57(1), Florida Administrative Code.

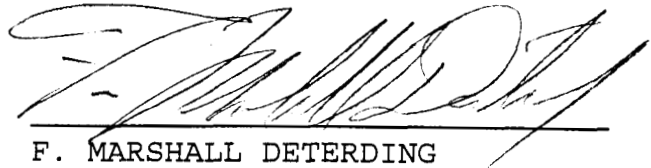
Respectfully submitted on this
15th day of June, 1999, by:



F. Marshall Deterding
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Ralph Jaeger, Esquire, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399, and Steve Riley, Office of the Public Counsel, 111 W. Madison Street, 812 Claudepepper Building, Tallahassee, Florida 32399-1400 on this 15th day of June, 1999.



F. MARSHALL DETERDING