

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Disposition of CIAC
gross-up funds collected by
North Fort Myers Utility, Inc.
In Lee County.

DOCKET NO. 971179-SU
ORDER NO. PSC-99-2377-PC0-SU
ISSUED: December 6, 1999

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS

ORDER REQUIRING SHOW CAUSE PROCEEDING TO BE ADDRESSED AT HEARING

BY THE COMMISSION:

BACKGROUND

North Fort Myers Utility, Inc. (NFMU or utility) is a Class A wastewater utility providing service to approximately 5,360 customers in Lee County. According to its 1997 annual report, the utility reported gross operating revenues of \$1,958,553 and a net operating income of \$446,362.

This docket was opened to determine whether NFMU should be required to refund excess gross-up collections for fiscal year 1994 (ended May 31, 1995), fiscal year 1995 (ended May 31, 1996), and fiscal year 1996 (ended May 31, 1997). By Order No. PSC-99-1068-PAA-SU issued May 25, 1999, we required the utility to show cause, in writing within twenty-one days, why a fine in the total amount of \$15,000 should not be imposed for the utility having improperly implemented three price indexes in apparent violation of Section 367.081(4), Florida Statutes. That Order further required any utility response to contain specific allegations of fact and law, and that if the response raised material questions of fact and requested a hearing pursuant to Section 120.57, Florida Statutes, further proceedings would be scheduled before final determination was made. The portion of the Order addressing the show cause proceedings was issued as final agency action.

In that same Order, by proposed agency action (PAA), we: (1) approved the utility's request for a variance from Order No. PSC-

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96-1180-FOF-WS (Order revoking authority to continue CIAC gross-up); (2) required the utility to refund a portion of CIAC gross-up for fiscal years 1994, 1995, and 1996; and (3) required the utility to refund portions of the price indexes for the years 1995, 1996, and 1997. However, by Petition on Proposed Agency Action filed June 15, 1999, OPC protested the PAA portion of the Order and requested a formal hearing. As a result of this protest, a formal hearing is now scheduled for April 13-14, 2000.

On June 15, 1999, the utility filed its Response to Show Cause. In that response, the utility "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." Also, in its response, the utility alleges that there are at least nine separate issues of material fact and at least two issues of law.

SHOW CAUSE PROCEEDING

As stated above, by Order No. PSC-99-1068-PAA-SU, issued May 25, 1999, we ordered NFMU to show cause, in writing, within 21 days why a fine in the total amount of \$15,000 should not be imposed for the utility having improperly implemented three price indexes in apparent violation of Section 367.081(4), Florida Statutes. Pursuant to that Order, the utility timely filed its response on June 15, 1999.

In that response, the utility argues that its original annual reports were correct and that the price indexes were "correct, and not 'improperly implemented,' or 'based on inaccurate operating costs.'" It further argues "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."

The utility maintains that the staff (and Commission) has had a dramatic shift in policy in that the staff has previously recognized that the costs classified as below-the-line for gross-up purposes might be different and were not tied to the annual report. The utility claims that Order No. PSC-99-1068-PAA-SU raises nine separate issues of material fact. Further, the utility states that it "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." To the extent that we decide to proceed with the show cause proceeding, the utility

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requests a hearing pursuant to the provisions of Chapter 120.57(1), Florida Administrative Code.

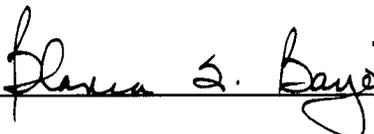
Because there appear to be issues of material fact, and the utility has requested a formal hearing if any fine is contemplated, we find it appropriate to include the show cause issue in the issues to be considered at the formal hearing scheduled for the protest of the PAA portion of Order No. PSC-99-1068-PAA-SU. Therefore, this docket shall remain open for the conduction of the hearing currently scheduled for April 13-14, 2000.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the issue of the show cause proceeding shall be considered at the formal hearing scheduled for the protest of the proposed agency action portion of Order No. PSC-99-1068-PAA-SU. It is further

ORDERED that this docket shall remain open for the conduction of the formal hearing.

By ORDER of the Florida Public Service Commission this 6th day of December, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

RRJ

Commissioner E. Leon Jacobs dissents from the decision in this Order to continue with the show cause proceeding and would have terminated such proceeding.

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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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.