

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-00-0576-AS-SU
ISSUED: March 22, 2000

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.
LILA A. JABER

ORDER ACCEPTING SETTLEMENT AGREEMENT, REQUIRING REFUNDS,
AND CLOSING SHOW CAUSE PROCEEDING

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 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). Effective January 1, 1987, contributions-in-aid-of-construction (CIAC) became gross income and were depreciable for federal tax purposes. Therefore, 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.

However, the Small Business Job Protection Act of 1996 (the Act) provided for the non-taxability of CIAC collected by water and wastewater utilities effective for amounts received after June 12, 1996. Based on this change in the law, by Order No. PSC-96-1180-

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1996 RECORDS/REPORTING

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FOF-WS issued September 20, 1996, in Docket No. 960965-WS, we revoked the authority of utilities to collect gross-up of CIAC and canceled the respective tariffs unless, within 30 days of the issuance of the order, affected utilities requested a variance. Although NFMU did not request a variance, it explained in a letter dated January 10, 1997, that it did not believe that the continued collection of the installment payments constituted a variance, but merely a payment of a debt over a period of time. To the extent a variance was required, the utility requested a variance.

NFMU provides wastewater service to several subdivisions (Forest Park, Lake Arrowhead, Carriage Village, Tamiami Village, and Lazy Days) formerly receiving service through package plants. In each case, under the authority granted in its tariff, NFMU allowed each customer to either pay in full the plant capacity charge and applicable gross-up at the time of connection onto the utility's central wastewater system or pay by installment payments over a seven-year period for the total amount owed. This installment arrangement was undertaken and authorized for the convenience of the customers who could not or chose not to pay their plant capacity fees and gross-up at the time of connection.

Although the Act provided for the non-taxability of CIAC collected by water and wastewater utilities for amounts received after June 12, 1996, several of the contractual agreements between the customers and the utility continue to be outstanding and require payments after June 12, 1996. As a result, on November 18, 1996, the Office of Public Counsel (OPC) advised our staff that several customers had contacted OPC regarding the status of the customer's obligation to continue paying the gross-up amount of the installment payment to NFMU. On November 12, 1997, OPC filed its Notice of Intervention, and by Order No. PSC-97-1474-PCO-SU, we acknowledged OPC's intervention.

Because the utility had entered into these "installment contract" agreements prior to June 12, 1996, our staff initially thought the installment contracts would be "income" in the year the contracts were entered into. However, upon realizing that the utility had not reported the amounts due as income and that the utility was not treating the installment payments received after June 12, 1996 as taxable income on its tax return, our staff determined that such treatment would have given the utility a windfall. Therefore, our staff revised the CIAC gross-up refund calculations to remove the installment contracts as being taxable income and the utility was advised accordingly.

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In response, on December 12, 1997, the utility filed a certified copy of the amended tax returns with this Commission along with a copy of the return receipt from the Internal Revenue Service. Based on these revised tax returns, our staff filed a recommendation on December 3, 1998, to address the utility's request for a variance from Order No. PSC-96-1180-FOF-WS, to address the disposition of gross-up funds collected by the utility in 1994, 1995, and 1996, including the concerns of Mr. Pete Longjohn, President of Tamiami Village Homeowners Association, and the concerns expressed in the letters and telephone calls received from customers of NFMU, to address the utility's request that 50 percent of its legal and accounting costs be offset against the refund amounts, and to address the utility's informal Settlement Offer filed October 2, 1998, and OPC's response to the utility's offer. However, this recommendation was deferred from the December 16, 1998, Agenda Conference.

Finally, at the May 4, 1999 Agenda Conference, we considered all the above-noted concerns. Also, we considered the following additional issue:

Should the Commission order North Fort Myers Utility, Inc., to show cause, in writing within twenty-one days, why it should not be fined an amount up to \$5,000 for each offense for: 1) its apparent failure to timely request a variance for the continued collection of CIAC gross-up as required by Order No. PSC-96-1180-FOF-WS; 2) its apparent failure to file accurate annual reports for the years 1994, 1995, 1996, and 1997, in compliance with Rule 25-30.110(9), Florida Administrative Code; and 3) its apparent implementation of price-index rate increases based on inaccurate operating costs in violation of Section 367.081(4)(c), Florida Statutes?

In considering this issue, we determined that the utility should only be made to show cause why it should not be fined for its apparent improper implementation of three price indexes in violation of Section 367.081(4), Florida Statutes. This decision was memorialized by Order No. PSC-99-1068-PAA-SU, issued May 25, 1999. That Order further required any utility response to contain specific allegations of fact and law, and that if the utility 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

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Order addressing the show cause proceedings was issued as final agency action.

In that same Order, by proposed agency action, we: (1) approved the utility's request for a variance from Order No. PSC-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 and 1995; (3) ordered the utility to make no further refunds for fiscal year 1996; and (4) 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 proposed agency action portion of the Order and requested a formal hearing. As a result of this protest, a formal hearing was scheduled for April 13-14, 2000.

On June 15, 1999, the utility filed its Response to Show Cause (Response). 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, requested a hearing pursuant to the provisions of Chapter 120.57(1), Florida Administrative Code."

Our staff originally filed its recommendation on the utility's Response for the October 5, 1999 Agenda Conference, by which staff recommended that the show cause issue merely be included in the hearing currently scheduled on the protest of Proposed Agency Action Order No. PSC-99-1068-PAA-SU. However, at the agenda conference, our staff indicated that perhaps a show cause proceeding should not proceed at all. Therefore, we voted to defer the item.

In its revised recommendation filed on November 4, 1999, our staff recommended that the utility not be fined for its apparent violation of Section 367.081(4)(c), Florida Statutes (improper implementation of price indexes), and that the show cause proceeding be terminated. However, we decided to proceed with the show cause proceeding and to address it as an issue in the formal hearing scheduled pursuant to OPC's protest of PAA Order No. PSC-99-1068-PAA-SU. This decision was memorialized by Order No. PSC-99-2377-PCO-SU, issued December 6, 1999.

Nevertheless, during the preparations for hearing, the parties reached a total settlement of the pending dispute. By Settlement Agreement, executed on February 4, 2000 and filed with this Commission on February 7, 2000, the parties proposed to fully

dispose of this pending case. The purpose of this Order is to address the proposed Settlement Agreement.

SETTLEMENT AGREEMENT

By Order No. PSC-99-1068-PAA-SU, we initially proposed to require NFMU to, among other things: (1) refund excess gross-up of CIAC in the amount of \$74,239 for fiscal year 1994 (ended May 31, 1995), and \$51,999 for fiscal year 1995 (ended May 31, 1996), plus any accrued interest; (2) 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; (3) make no further refunds for fiscal year 1996; and (4) refund, with interest, the portion of the revenues received as a result of the apparent improper implementation of the price indexes for the years 1995, 1996, and 1997. However, as stated above, OPC protested the PAA portion of the Order, and a formal hearing was scheduled for April 13-14, 2000.

In preparation for this hearing, the parties have reached a settlement. In the Settlement Agreement, recognizing the "expensive uncertainty of continuing this proceeding," and wishing "to effectuate a settlement, which will affect all aspects of this case, including gross-up for NFMU, previously filed indexes, and the Show Cause proceeding," the parties agree as follows:

a. The parties agree to support this Settlement Agreement as the final disposition of all matters covered by Order No. PSC-99-1068-PAA-SU and specifically, all matters related to gross-up for NFMU, correction of index rate increases previously filed and considered in Order No. PSC-99-1068-PAA-SU, and all Show Cause proceedings referenced in Order No. PSC-99-1068-PAA-SU.

b. NFMU will immediately refund \$300,000 pro rata to customers who have made gross-up payments during the fiscal years ended May 31, 1995 and May 31, 1996. To the extent monies are still owing on installment contracts, that refund will go to reduce installment payments still owed for the tax impact first, and secondly to credit any payments due for CIAC charges. This refund amount will include any interest owing and no further calculations of interest will be applicable.

c. NFMU will book to CIAC at the end of the year 2000 an additional \$300,000.

d. There will be no rate reductions or refunds related to indexes considered in Order No. PSC-99-1068-PAA-SU. However, NFMU shall forgo the indexes due to be filed no later than March 31, 2000, 2001, and 2002 in the future.

e. NFMU has already foregone two indexes in hopes of settling this case, at a value of approximately \$20,000 per year each beginning in 1997.

f. NFMU shall not file for rate relief during the period of time that indexes are being foregone under item number 5 above (up through March 31, 2002), except under circumstances where additional requirements or costs are imposed by duly authorized authorities which necessitate changes in operations, capital additions, or taxes, for which NFMU may seek recovery.

g. The Order to Show Cause proceeding against NFMU shall be dismissed without penalty to NFMU, and this Settlement Agreement shall act as a settlement without further action for all of the alleged violations of Commission Rule, Order or Statute referenced in Order No. PSC-99-1068-PAA-SU as a basis for Show Causing, or possibly Show Causing NFMU.

h. The Settlement Agreement shall be submitted to the Commission as the resolution of all disputes and matters contained in Order No. PSC-99-1068-PAA-SU and in Docket No. 971179-SU, as quickly as is practicable. The parties agree that this Settlement Agreement is made solely for the purpose of settling the instant proceeding and can not be considered as a precedent to any other proceeding.

i. The parties hereto agree that all further action in the proceedings to be held in Docket No. 971179-SU as outlined in the Commission's previously issued Orders, schedules, and discovery in this case, shall be suspended pending Commission consideration of this Settlement Agreement.

j. The provisions of this Settlement Agreement are not severable and shall become effective only after the

Commission has entered an order approving the Agreement in total. In the event the Settlement is not approved in whole, without modification, the Settlement Agreement shall be deemed withdrawn and null and void, and neither party may use this attempted Settlement Agreement in this or any other proceeding. If this Settlement Agreement is not approved by the Commission, both parties are free to pursue the full range of legal remedies which otherwise would be available to them.

We note that the refund of \$300,000 is significantly higher than that first proposed in Order No. PSC-99-1068-PAA-SU (that Order required a total of \$126,238, plus interest, in CIAC gross-up to be refunded). Also, we note that there was a question of how some expenses should be treated in regards to CIAC gross-up as opposed to price indexing and overearning (whether expenses should be above the line for price indexing and overearnings, but below the line for calculating CIAC gross-up). While not specifically reaching this point, the utility has already forgone two price indexes and has agreed to forego three more. Further, the utility has agreed to forego filing for rate relief through March 31, 2002, "except under circumstances where additional requirements or costs are imposed by duly authorized authorities which necessitate changes in operations, capital additions, or taxes, for which NFMU may seek recovery." Finally, NFMU has agreed to credit \$300,000 to CIAC at the end of the year 2000.

Having reviewed all the above provisions, we find that the Settlement Agreement provides a fair and reasonable resolution of this matter and is a reasonable compromise and in the public interest. Therefore, we accept the Settlement Agreement in its entirety.

For those contributors who have paid the full amount of the original gross-up and CIAC charges, the utility shall make a refund based on the contributors' pro rata share of the agreed upon total refund amount of \$300,000 for the fiscal years ended May 31, 1995 and May 31, 1996. For those contributors who are paying by installment, to the extent monies are still owing on installment contracts, that pro rata refund will first go to reduce installment payments still owed for the tax impact (CIAC gross-up), and secondly to credit any payments due for CIAC charges. If the pro rata refund is greater than the remaining installment payments for the combined CIAC gross-up charges and CIAC charges, the utility

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shall make refunds as appropriate, and discontinue any further collections.

The refunds shall be completed within 6 months of the date of the Order. Within 30 days from the completion date of the refund, the utility shall submit copies of canceled checks, credits applied to the monthly bills or other evidence that verifies that the utility has made the refunds. Within 30 days from the completion date of the refund, the utility shall also provide a list of unclaimed refunds detailing contributor and amount, and an explanation of the efforts made to make the refunds. To the extent that the utility is unable to refund the full amount of the \$300,000, and upon verification by our staff, the undeliverable amount shall also be credited to CIAC. Further, on October 1, 1996, the utility refunded \$2,753.82 it collected for the period of June 1 through June 12, 1996, and no refund is required for the fiscal year 1996 (ended May 31, 1997).

Finally, we note that the Settlement Agreement is dependent upon the closing of the show cause proceeding. It appears that the Settlement Agreement takes into account that the utility may have improperly implemented three price indexes, and that acceptance of the agreement will avoid the time and expense of a hearing. Therefore, we will also accept this provision of the Settlement Agreement, and the show cause proceeding shall be terminated.

CLOSING OF DOCKET

This docket shall remain open so that our staff may verify that the refunds have been made and that any unclaimed refunds have been credited to the CIAC account. Upon verification that the refunds have been made, that appropriate efforts have been made to distribute the unclaimed refunds, and upon the utility having credited the unclaimed refunds to the CIAC account, the docket shall be closed administratively.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Settlement Agreement, submitted by North Fort Myers Utility, Inc., and the Office of Public Counsel is accepted in its entirety. It is further

ORDERED that North Fort Myers Utility, Inc., shall make the refunds in the total amount of \$300,000 for the fiscal years ended

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May 31, 1995, and May 31, 1996, as set forth in the body of this Order. It is further

ORDERED that, pursuant to Orders Nos. 16971 and 23541, all refund 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 North Fort Myers Utility, Inc., shall submit copies of canceled checks, 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, North Fort Myers Utility, 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 to the extent that it is unable to refund the full amount of the \$300,000, and upon verification by our staff, North Fort Myers Utility, Inc., shall credit the undeliverable amount to contributions-in-aid-of-construction. It is further

ORDERED that no further refunds are required for fiscal year ended May 31, 1997. It is further

ORDERED that the show cause proceeding shall be closed without penalty to North Fort Myers Utility, Inc. It is further

ORDERED that, pursuant to the Settlement Agreement, North Fort Myers Utility, Inc., shall book an additional \$300,000 to contributions-in-aid-of-construction at the end of the year 2000. It is further

ORDERED that, pursuant to the Settlement Agreement, North Fort Myers Utility, Inc., shall forego the price indexes due to be filed no later than March 31, 2000, 2001, and 2002 in the future. It is further

ORDERED that, pursuant to the Settlement Agreement, North Fort Myers Utility, Inc., shall not file for rate relief during the period of time that indexes are being foregone except under the conditions as noted in the body of this Order. It is further

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ORDERED that upon our staff's verification that the refunds have been made, that appropriate efforts have been made to distribute the unclaimed refunds, and upon the utility having credited the unclaimed refunds to the contributions-in-aid-of-construction account, the docket shall be closed administratively.

By ORDER of the Florida Public Service Commission this 22nd day of March, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

RRJ

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida

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Administrative Code; or 2) 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 and/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 after the issuance 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.