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RECORDS AND
REPORTING

June 15, 1999

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Disposition of CIAC gross-up funds collected by North Fort Myers Utility, Inc.
in Lee County; Docket No. 971179-SU

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of a Petition on Proposed Agency Action in the
above-referenced docket.

Also enclosed is a 3.5 inch diskette containing the Petition on Proposed Agency Action in
WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy
of this letter and returning it to this office. Thank you for your assistance in this matter.

RECEIVED & FILED

[Signature]
FPSC-BUREAU OF RECORDS

Sincerely,

[Signature: Stephen C. Reilly]

Stephen C. Reilly
Associate Public Counsel

SCR/dsb
Enclosures

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DOCUMENT FILED-DATE

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RECORDS AND REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Disposition of CIAC) Docket No. 971179-SU
gross-up funds collected by)
North Fort Myers Utility, Inc.) Filed: June 15, 1999
in Lee County.)
_____)

PETITION ON PROPOSED AGENCY ACTION

The Citizens of the State of Florida, who are also customers of North Fort Myers Utility (“Citizens”), by and through their undersigned attorney, pursuant to Section 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code, file these objections to certain portions of the proposed action embodied in the Florida Public Service Commission (“Commission”), PAA Order No. PSC-99-1068-PAA-SU, issued on May 25, 1999, (“Order”) and petition for a hearing on specified issues. As grounds Petitioners state:

This Petition is organized and presented in a manner so as to conform to the requirements of Rule 28-106.201(2), Florida Administrative Code, the provisions of which are set forth in italics below:

(a) The name and address of each agency affected and each agency’s file or identification number, if known;

1. The agency affected is the Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850. The Agency’s docket number is Docket 971179-SU.

(b) The name, address, and telephone number of the petitioner; the name address, and telephone number of the petitioner’s representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner’s substantial interests will be affected by the Agency determination;

2. The Petitioners are the Citizens of the State of Florida, which are customers of North Fort Myers Utility (“NFMU”, “utility” or “company”). There are over 5,300 NFMU customers with

different addresses. They are represented by the Office of Public Counsel, 111 W. Madison Street, Tallahassee, Florida, telephone number (850)488-9330. The Petitioners' substantial interests are affected because Order No. PSC-99-1068-PAA-SU would cause some Citizens to continue to be required to pay tax gross-up payments on contributions-in-aid-of-construction ("CIAC") received by NFMU after June 12, 1996, would reduce refunds required by Commission rules, by fifty percent (50%) of certain legal fees and accounting costs incurred by NFMU, as a direct result of its overcollection of tax gross-up on CIAC and would permit NFMU to materially underpay refunds owing to the Citizens for NFMU's overcollection of tax gross-up on CIAC collected for the years 1994 and 1995;

(c) A statement of when and how the petitioner received notice of the agency decision;

3. Petitioners received notice of the proposed agency decision by receipt of a copy of PSC-99-1068-PAA-SU shortly after it was published by the Commission;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

4. Petitioners dispute the following issues of material fact which the Proposed Agency Action Order purportedly resolves adversely to Petitioners:

a. That the amended annual reports for 1994, 1995 and 1996 accurately reflect the company's utility operations for those years.

b. While the Citizens believe that the original annual reports accurately describe the utility's operations, if the Commission holds otherwise, the Citizens dispute the Order's failure to initiate a show cause proceeding and penalize the utility for having filed incorrect annual reports.

- c. The Order's granting the utility a variance from Order No. PSC-96-1180-FOF-WS by allowing it to continue to collect CIAC gross-up from customers who entered into installment contracts with NFMU prior to June 12, 1996.
- d. The offset of the amount of CIAC gross-up refunds by 50% of the legal and accounting fees incurred by the utility in the amount of \$8,048 for 1994 and \$9,101 for 1995.
- e. The Order's apparent acceptance of the Utility's amended tax returns as partial support for the amount of tax gross-up on CIAC to be ordered by the Commission to be refunded.
- f. The Order's statement that the reclassification of expenses does not cause the utility to exceed the range of its authorized return on equity.
- g. The acceptance by the Order that it was appropriate to move below the line \$438,272 of O&M expenses and \$246,275 of depreciation expense for purposes of calculating the amount of CIAC gross-up that should be refunded to customers for 1994.
- h. That the appropriate amount of CIAC gross-up that should be refunded to customers for 1994 is \$82,287 and all calculations that entered into the development of this refund amount.
- i. The acceptance by the Order that it was appropriate to move below the line \$374,019 of O&M expenses and \$301,604 of depreciation expense for purposes of calculating the amount of CIAC gross-up that should be refunded to customers for 1995.
- j. That the appropriate amount of CIAC gross-up that should be refunded to customers for 1995 is \$61,100 and all calculations that entered into the development of this refund amount.

k. The Order's acceptance of the utility's revised Annual Reports for the years 1994, 1995, and 1996 as supporting the amount of the price indexing amounts that must be refunded to customers and the concomitant reduction in rates.

l. That the amount of indexing increases were overstated due to the utility's filing of incorrect Annual Reports for the years 1994, 1995, and 1996.

m. That indexing refunds should be implemented due to the utility's filing of incorrect Annual Reports for the years 1994, 1995, and 1996.

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

5. Petitioners reiterate all subparagraphs of 4 above and in addition say:

a. The Commission should not act to negate or defeat the act of Congress which passed the Small Business Job Protection Act of 1996, which became law on August 20, 1996, and provides for the non-taxability of CIAC collected by water and wastewater utilities effective retroactively for amounts **received** after June 12, 1996. For three years NFMU has managed to operate outside of this law. The Commission's Order permits the utility to alter its books and records, annual reports and even federal tax returns to devise ways and means to defeat the purposes of this law and the Commission's Order No. PSC-96-1180-FOF-WS. The Commission should not, three years after the fact, grant NFMU a variance from this law and the Commission's Order No. PSC-96-1180-FOF-WS for tax gross-up on CIAC collected from customers who entered into installment contracts with NFMU prior to June 12, 1996.

b. Orders Nos. 16971 and 23541 do not provide for or contemplate the offset (50% or otherwise) being proposed by NFMU and accepted by the Commission's staff. Since we are

going to hearing anyway there will be no savings realized by the customerse in approving the imposition of an unauthorized offset to the customers' refunds. The Commission should not approve a reduction of the customer's refunds by 50% of the approved legal and accounting fees incurred by NFMU in the amount of \$8,048 for 1994 and \$9,101 for 1995. NFMU over collected tax gross-up on CIAC, and it is the cost causer and should bear this cost.

c. The Commission should not sanction nor approve NFMU's efforts to manipulate its books, records, annual reports and even federal tax returns in an open and brazen attempt to pocket the overcollection of tax gross-up on CIAC, which should rightfully be refunded to customers. NFMU's attempt is "brazen" because in its communications with staff it readily admits, in writing, that its manipulation of hundreds of thousands of dollars of utility expenses from above the line to below the line, found in its amended annual reports, is offered **solely** for tax gross-up purposes and expressly not for rate setting purposes. Additionally, the utility appears to suggest that these same expenses should also be treated as above the line for indexing and normal annual report purposes. In its PAA, the Commission has tentatively approved a regulatory policy which is untenable. Order No. PSC-99-1068-PAA-SU may permit NFMU to report some expenses above the line for rate setting, indexing and normal annual report purposes, but allow NFMU to report these same expenses as below the line solely for tax gross-up purposes, in order to permit the utility to pocket hundreds of thousands of dollars that rightfully should be refunded to customers, under the Commission's rules. The Commission should not permit this manipulation of

utility expenses. The Commission should order the Utility to refund to the customers the refunds previously calculated by its staff namely, \$322,070 for 1994 and \$229,958 for 1995.

c. If the Commission resolves the above issues as advocated by the Citizens it should not order refunds and impose a rate reduction for price indexes implemented by NFMU for the years 1995, 1996 and 1997.

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action;

6. The following rules or statutes are violated by Order No. PSC-99-1068-PAA-SU:

a. Section 367.081, Florida Statutes, requires the Commission to establish rates which are just, reasonable, compensatory and not unfairly discriminatory. Operating expenses incurred in the operation of utility property used and useful in the public service is always an important element in determining just, reasonable and compensatory rates. Utility expenses that are deemed just and reasonable for rate setting and index purposes can not also be deemed unjust and unreasonable for tax gross-up purposes, without violating the basic principles of fair and just regulation, and the provisions of Section 367.081, Florida Statutes.

b. NFMU violated Commission Order No. PSC-96-1180-FOF-WS, when it continued to collect tax gross-up on CIAC collections without seeking a variance from the rule within the required thirty (30) days. The Commission should not now grant an untimely request for variance from this rule.

c. The refunds ordered by the Commission in Order No. PSC-99-1068-PAA-SU are inconsistent with requirements of the Commission's prior orders 16971 and 23541, which

prescribe the reporting requirements and procedure for determining the amount of tax gross-up on CIAC collections that must be refunded to customers.

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

7. The Citizens respectfully request a formal evidentiary hearing concerning this petition, for the grounds enumerated above. The relief specifically being sought by the Citizens is as follows:

a. The Commission should not provide a variance to NFMU from the requirements of Commission Order No. PSC-96-1180-FOF-WS, by allowing it to continue to collect tax gross-up on CIAC collected from customers who entered into installment contracts with NFMU prior to June 12, 1996.

b. The Commission should not off-set the refunds owed to customers by 50% of the approved legal and accounting costs incurred by NFMU to determine and administer the refunds.

c. The Commission should order NFMU to refund to its customers, as prescribed by Commission Orders Nos. 16971 and 23541, the refunds previously calculated by the Commission's staff, \$322,070 for 1994 and \$229,958 for 1995.

d. If the Commission resolves the above issues as advocated by the Citizens, the Commission should not also order refunds and impose a rate reduction for price indexes implemented by NFMU for the year 1995, 1996 and 1997.

WHEREFORE, Petitioners, request a formal hearing under Sections 120.569 and 120.57(1),
Florida Statutes, upon the matters raised herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S.C. Reilly", is written over a horizontal line. The signature is stylized and somewhat cursive.

Stephen C. Reilly
Associate Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400

(850) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 971179-SU

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition on Proposed Agency Action has been furnished by U.S. Mail or *hand-delivery to the following parties on this 15th day of June, 1999:

Marshall Deterding, Esquire
Rose Law Firm
2548 Blairstone Pines Drive
Tallahassee, FL 32301

Ralph Jaeger, Esquire*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850



Stephen C. Reilly
Associate Public Counsel