

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Request for continuation) | DOCKET NO. 901013-SU |
| of gross-up of contributions-in-) | |
| aid-of-construction (CIAC) in Lee) | ORDER NO. 25532 |
| County by NORTH FORT MYERS) | |
| UTILITY, INC.) | ISSUED: 12/24/91 |
|) | |

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 SUSAN F. CLARK
 J. TERRY DEASON
 BETTY EASLEY

NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING CONTINUED GROSS-UP OF
CONTRIBUTIONS-IN-AID-OF-CONSTRUCTION AND
APPROVING REFUND WITH MODIFICATIONS

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 adversely affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

In Order No. 23541, issued October 1, 1990, we determined that any water and wastewater utility currently collecting gross-up on contributions-in-aid-of-construction (CIAC) must file a petition for continued authority to gross-up and for approval of certain refunds to contributors. In Order No. 23689, issued October 29, 1990, we extended the time to file petitions to continue to gross-up to January 2, 1991. On December 27, 1990, North Fort Myers Utility, Inc. (North Fort Myers or the utility) timely filed a petition requesting approval to continue to collect the gross-up of its CIAC and to refund certain amounts of gross-up collected for the fiscal year ended May 31, 1988 and 1989.

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APPROVAL TO CONTINUE GROSS-UP

In accordance with Order No. 23541, the utility has provided the Commission with a cash flow statement, a statement of interest coverage indicating a times interest earned (TIE) ratio of less than 2x, and a statement that it does not have an alternative source of funds available at a reasonable rate. Further, as justification for the gross-up, the utility states that it is highly leveraged and has incurred substantial debt in excess of rate base; it has negative cash flow; interest coverage was negative in 1989 and its TIE ratio was .12x in 1988; tax losses relate to below-the-line items; and it expects to receive significant amounts of CIAC. Thus, the utility will incur an above-the-line tax liability associated with the collection of CIAC but it will not be able to generate the funds to finance the taxes either through its existing rates or alternative financing. The utility also indicated that it selected the full gross-up method because it is the least costly alternative and it has not resulted in competitive disadvantage or decreased growth. Finally, the utility submitted proposed tariffs for the gross-up. Based on the information filed, we find that the utility has demonstrated a continued need to collect the gross-up. Its request to continue collecting the gross-up is, therefore, approved. The proposed tariffs submitted by the utility shall be effective upon the expiration of the protest period, if no protests are filed.

All gross-up CIAC collections are to be made in accordance with the accounting and regulatory treatments and record keeping prescribed in Orders Nos. 16971, issued December 18, 1986, and 23541, and all matters discussed in the body of those Orders are expressly incorporated herein by reference.

REFUND APPROVED

Order No. 23541 required that all gross-up amounts in excess of a utility's actual tax liability resulting from its collection of CIAC should be refunded, with interest, on a pro rata basis to those persons who contributed the taxes. Order No. 16971 required that the CIAC tax impact amounts be deposited as received into a fully funded interest bearing escrow account. The Order further required that CIAC tax impact monies received during the tax year which were in excess of the actual amount of tax expense attributable to the receipt of CIAC, together with the interest earned on such excess monies held in the CIAC Tax Impact Account,

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must be refunded. No refund was requested for the fiscal year ended May 31, 1988, and we find that based on the utility's request that no refund is required.

In calculating the refund for the fiscal year ended May 31, 1989, the utility excluded the above-the-line loss for 1989 from its calculation. In fiscal year 1989, the company completed and placed into service a 1.0 mgd wastewater treatment plant and deep well disposal system. The utility stated that increased used and useful operating expenses have resulted in above-the-line losses, and that the utility is currently assessing the feasibility of filing a general rate case in order that increased operating expenses can be recovered in rates. The utility stated that until rates are increased, the stockholders must fund the operating costs, with no chance to ever recover these costs in future rates. As a result, the utility stated, the expenses created by this substantial change in operations, which have not been recognized in rate settings, and the resulting tax losses are below-the-line losses and should not be used to the benefit of a CIAC contributor or any other party other than utility shareholders.

We find it appropriate to include the loss for fiscal year 1989 above-the-line. Although the utility has not filed for a general rate case to include the increased expenses in its current rates, the expenses are nevertheless above-the-line expenses and the resulting loss an above-the-line loss. The stockholders may be funding the increased operating costs associated with the 1.0 mgd wastewater treatment plant; however, it is incumbent upon the utility to seek compensatory rates to fund operating costs when a revenue deficiency exists. Any revenue deficiency is to be collected from the general body of rate payers and not funded by gross-up collections from the contributor. To exclude the loss from the refund calculation, and not require a refund of the over collection of gross-up, would result in requiring the contributor, and not the general body of rate payers, to fund the operating costs of the utility. Order No. 23541 requires that all gross-up amounts in excess of a utility's actual tax liability resulting from its collection of CIAC should be refunded on a pro rata basis to those persons who contributed the taxes. Therefore, the utility is allowed to retain the gross-up collections only to the extent that it has incurred an actual above-the-line tax liability. In addition, Order No. 23541 requires utilities to offset CIAC income against their net operating losses. Including the loss in the refund calculation we find the appropriate amount to be refunded is \$54,116 for the fiscal year ended May 31, 1989. Accordingly, we find that this amount, plus accumulated interest from May 31, 1989 through the date of the refund, is the appropriate amount to be

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refunded to the contributors of the taxes on a pro rata basis. The refund is to be made in accordance with Orders Nos. 23541 and 16971.

Further, the utility must file with the Commission a report of the refund so that we may verify the amount of the refund. This refund and filing must occur within six months from the date of this Order unless a timely protest is received.

In consideration of the foregoing it is

ORDERED by the Florida Public Service Commission that approval is granted for North Fort Myers Utility, Inc. to continue collecting the gross-up on CIAC. It is further

ORDERED that the tariffs filed by North Fort Myers Utility, Inc. shall be effective upon expiration of the protest period, as set forth below in the Notice of Further Proceedings, if no timely protests are filed. It is further

ORDERED that North Fort Myers Utility, Inc. is hereby Ordered to refund \$54,116, plus interest accumulated through the date of refund, to contributors on a pro rata basis. It is further

ORDERED that North Fort Myers Utility, Inc. shall file with the Commission a report of the refund in order to verify the amount of the refund. It is further

ORDERED that the refund and report of the refund shall be completed within six months from the date of this Order. It is further

ORDERED that all 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 at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the date set forth in the Notice of Further Proceedings below. It is further

ORDERED that in the event no timely protest is received, this docket shall be closed.

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By ORDER of the Florida Public Service Commission, this 24th
day of December, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CB

Dissent: Chairman Beard dissented regarding the requirement
that a refund be made.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

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 at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on 1/14/92.

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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 adversely 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 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.