

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Disposition of contributions-in-aid-of-construction (CIAC) funds received by Martin Downs Utilities, Inc. in Martin County during 1990, 1991, 1992, and 1993.

DOCKET NO. 931065-WS
ORDER NO. PSC-98-1116-FOF-WS
ISSUED: August 21, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER REQUIRING ACTION TO BE FILED IN CIRCUIT COURT

BY THE COMMISSION:

BACKGROUND

Martin Downs Utilities, Inc. (Martin Downs or utility) was incorporated in the State of Florida in April 1981. Initially, Martin Downs was a wholly-owned subsidiary of Southern Realty Group, Inc. (SRG). However, on January 25, 1990, Martin Downs was recapitalized and then sold by SRG, to an entity controlled by certain SRG shareholders.

On October 26, 1990, Martin Downs filed for authority to continue to collect gross-up on contributions-in-aid-of-construction (CIAC). By Order No. 25360, issued November 19, 1991, Martin Downs was granted authority, in accordance with Orders Nos. 16971 and 23541, to continue to gross-up using the full gross-up formula.

Martin Downs was a Class A utility which provided services to approximately 3,486 water and 2,981 wastewater customers in Martin County. According to the 1992 annual report, operating revenues were reported as \$1,112,379 for water and \$1,040,717 for

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wastewater. The utility reported net operating income of \$291,382 for the water system and \$261,177 for the wastewater system.

Martin Downs' facilities were sold to Martin County on August 12, 1993. By Order No. PSC-93-1484-FOF-WS, issued October 12, 1993, in Docket No. 930818-WS, the Commission acknowledged the transfer of the water and wastewater facilities to an exempt governmental entity and cancelled Certificates Nos. 343-W and 301-S. The disposition of CIAC gross-up collections was not addressed by Order No. PSC-93-1484-FOF-WS.

To address the disposition of CIAC gross-up funds collected for the period October 1, 1989 through August 12, 1993, our staff opened Docket No. 931065-WS on November 4, 1993. By letter dated November 23, 1993, our staff advised the attorney that had been representing Martin Downs that the disposition of CIAC gross-up funds collected through August 12, 1993, would be addressed in this new docket.

In compliance with Order No. 16971, Martin Downs filed its CIAC reports for the fifteen-month period of October 1, 1989 through December 31, 1990, and for the year ended December 31, 1991. By letter dated November 23, 1993, our staff submitted its preliminary refund calculation numbers to the utility. In that letter, staff specifically advised the utility that the preliminary analysis indicated that the utility had collected excess gross-up and that a refund might be required.

On December 16, 1993, the utility responded indicating that it disagreed with certain adjustments made by our staff. Our staff and the utility had several telephone discussions regarding the differences. As a result, by letter dated October 11, 1994, our staff requested additional clarifying information.

However, by letter dated November 15, 1994, Martin Downs' former shareholders inquired about whether the Commission had continuing jurisdiction over the CIAC gross-up refund now that the utility was being liquidated. Martin Downs cited two orders in which the Commission acknowledged a sale and specifically addressed refunds associated with the utility.

In one order, Order No. PSC-94-0201-FOF-WS, issued February 18, 1994, in Docket No. 940063-WS, involving Mid-Clay Services Corporation, we canceled the utility's certificate. The order stated that a separate docket concerning the refund of excess

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gross-up funds had been opened: "Because the excess funds were collected prior to the sale to Clay County, Mid-Clay remains subject to our jurisdiction until all refunds have been made." In the other order, Order No. PSC-94-0198-FOF-WS, issued February 17, 1994, in Docket No. 940051-WS, we addressed a similar situation. However, in this second case, the docket concerning the refund of CIAC gross-up funds was not opened until after the issuance of the Order acknowledging transfer and canceling certificate. By letter dated, November 29, 1994, counsel for the Commission advised Martin Downs that the Commission still had jurisdiction over the CIAC gross-up funds. Subsequently, on January 12, 1995, the utility responded to staff's concerns with revised schedules and additional clarifying information.

However, before staff could file its recommendation on the disposition of CIAC gross-up, questions were raised at the May 30, 1995 Agenda Conference in the refund case of Canal Utilities, Inc., in Docket No. 941083-WS, about whether or not our staff's method of calculating refunds was contrary to the requirements of Order No. 23541 and our previous practice. As a result, we directed our staff to hold workshops to discuss the current practices employed in dealing with the taxability of CIAC and to discuss viable alternatives. While these workshops were being scheduled, the records of the Department of State show that Martin Downs was administratively dissolved as of August 25, 1995.

On March 29, 1996, Docket No. 960397-WS was opened to review our policy concerning the collection and refund of CIAC gross-up. Workshops were held and comments and proposals were received from the industry and other interested parties. While these workshops were being held, and pending further guidance from us on the proper handling of CIAC gross-up cases, our staff temporarily delayed the processing of this type of case. However, by Order No. PSC-96-0686-FOF-WS, issued May 24, 1996, we directed our staff to continue processing CIAC gross-up and refund cases pursuant to Orders Nos. 16971 and 23541.

Then, on August 20, 1996, the Small Business Job Protection Act of 1996 (The Act) became law. The Act provided for the non-taxability of CIAC collected by water and wastewater utilities effective retroactively for amounts received after June 12, 1996. Collections on or before that date remained taxable.

Resuming the processing of this case, staff, by letter dated July 2, 1997, asked Martin Downs the following questions:

1. Are there any funds in the CIAC Tax Impact Account of Martin Downs?
2. The CIAC Reports filed by Martin Downs indicate that the utility collected \$1,143,129 of gross-up for 1990 and \$528,593 for 1991. How much was in the CIAC Tax Impact Account as of:
 - a) August 11, 1995,
 - b) October 12, 1995.If the amount in the account was less than the amount of gross-up collected, please explain how the difference was used.
3. On whose authority were the funds distributed?
4. Who (name and address) received and how much did they receive from distribution of the CIAC Tax Impact Account?
5. Is a record of the contributors of the gross-up available for 1990 and 1991?

By letter dated July 25, 1997, Steve Fry responded for the utility as follows:

1. Martin Downs Utilities, Inc. (MDU) sold all of its assets to Martin County. That sale was closed in August, 1993. Subsequent to the sale, MDU was dissolved and the MDU Liquidating Trust was established to liquidate the company.
2. The Public Service Commission (PSC) relinquished its jurisdiction in October, 1993. The PSC's Order did not reserve any jurisdiction over any MDU matters.
3. The last contact I had with the PSC was in early 1996.
4. The Liquidating Trust was terminated in late 1996.
5. Neither MDU nor the Liquidating Trust have any assets or employees, nor do they transact any business. There are no bank accounts.
6. Due to two floods that occurred in the building formerly occupied by this company, and the relocation of this office, the few remaining MDU files are in a state of general disorder.

Based on the foregoing, I cannot answer any of the questions described in your letter other than the first question, "Are there any funds in the CIAC Tax Impact Account of MDU?" That question is answered by number 5 above.

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In reviewing the response, we found that Order No. PSC-93-1484-FOF-WS, issued October 12, 1993, merely acknowledged the sale (approved as a matter of right pursuant to Section 367.071(4)(a), Florida Statutes), canceled the certificates, and closed the docket, and did not address any continuing jurisdictional questions or say anything about relinquishing jurisdiction. In Proposed Agency Action (PAA) Order No. PSC-97-1147-FOF-WS, issued September 30, 1997, we interpreted the powers given to us by Section 367.011, Florida Statutes, and determined that it was not necessary for the October 12, 1993 Order to specifically retain jurisdiction or advise Martin Downs that refunds of CIAC gross-up, for the period October 1, 1989, through the date of sale, might be required. That PAA Order was not protested and became final on October 21, 1997.

Also, by opening Docket No. 931065-WS (opened November 4, 1993), by sending the November 23, 1993 letter, and by several other letters and meetings, we gave Martin Downs ample notice that the funds in the CIAC Tax Impact Account were still subject to refund. Further, Orders Nos. 16971 and 23541 specifically stated that the funds in this account would only be used to pay the taxes associated with the collection of the CIAC gross-up or they would be refunded to the contributors.

Our authority to address matters which occurred prior to the cancellation of a utility's certificate has been addressed in Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995). In that case, Charlotte County claimed that the utility overbilled it for service. The complaint was filed after the sale of the utility and cancellation of its certificate, but involved overbilling which occurred prior to the sale and cancellation. The Court held that the Commission had exclusive jurisdiction over the matter which occurred before the sale and cancellation of the certificate. The Court looked to the Commission's jurisdiction as defined by Section 367.011(2), Florida Statutes, and the definition of "utility" under Section 367.021(12), Florida Statutes.

Through Order No. PSC-97-1147-FOF-WS, we required Martin Downs to refund CIAC gross-up funds in the amount of \$32,361 for the fifteen-month period ending December 31, 1990, and \$22,064 for fiscal year 1991, plus accrued interest through the date of refund, for gross-up collected in excess of the tax liability for those periods. That Order further required all refund amounts to be refunded on a pro rata basis to those persons who contributed the taxes within six months of the effective date of the order. Within

thirty days from the date of the refund, the Order required the utility to submit copies of cancelled checks, credits applied to monthly bills or other evidence that verified that the utility had made the refunds. Within thirty days from the date of the refund, the utility was also to provide a list of unclaimed refunds detailing contributor and amount, and an explanation of the efforts made to make the refunds. No refund was required for the years 1992 and 1993.

We have now determined that no refunds were made and that all funds, including those in the CIAC Tax Impact Account, were dispersed by the Liquidating Trust to the shareholders several years ago. Therefore, the utility has not complied with the requirements of Order No. PSC-97-1147-FOF-WS.

ENFORCEMENT OF ORDER NO. PSC-97-1147-FOF-WS

Despite all indications that a refund would be required, the Liquidating Trust apparently distributed all funds without retaining at least the amount left in the CIAC Tax Impact Account to cover any possible refunds. Section 607.0834(1), Florida Statutes, specifically provides in pertinent part:

A director who votes for or assents to a distribution made in violation of s. 607.06401 . . . is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating s. 607.06401 . . . if it is established that he did not perform his duties in compliance with s. 607.0830.

Section 607.06401(3) provides in pertinent part:

No distribution may be made, if after giving it effect:
(a) The corporation would not be able to pay its debts as they become due in the usual course of business;

In this case the Liquidating Trust apparently distributed all funds without retaining any amounts whatsoever and without giving notice to the Commission. In order for a dissolved corporation to dispose of claims which are contingent, conditional, or unmatured, the corporation must, pursuant to Section 607.1406(4), Florida Statutes, give notice to the claimant. The Liquidating Trust did not appear to follow this procedure.

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In order for a director to be held liable for an unlawful distribution, a proceeding must be "commenced within 2 years after the date on which the effect of the distribution was measured under s. 607.06401(6) or (8)." Section 607.0834(3), Florida Statutes. Although we do not know when the distribution was made, the sale was not consummated until August 12, 1993, and Docket No. 931065-WS was opened on November 4, 1993. Section 607.01401(20), Florida Statutes, defines proceeding as one that "includes civil suit and criminal, administrative, and investigatory action."

Although there may be some question whether the opening of this docket satisfied the requirement that a proceeding be commenced within 2 years of the effect of the distribution, Section 607.1406(13), Florida Statutes, states that a shareholder may be held liable for a claim against the corporation if a proceeding is begun prior to the expiration of three years following the effective date of dissolution. The Department of State indicates that the date of dissolution was August 25, 1995, and it appears that a proceeding against the shareholders could be brought some three years after that date.

In the case at hand, there was a distribution made to shareholders, and we believe that both the directors who made the distribution, and the shareholders who received the distribution, could, absent certain defenses, be held liable for the refund required by Order No. PSC-97-1147-FOF-WS. Section 120.69(1)(a), Florida Statutes, entitled "Enforcement of agency action," provides: "Any agency may seek enforcement of an action by filing a petition for enforcement, as provided in this section, in the circuit court where the subject matter of the enforcement is located."

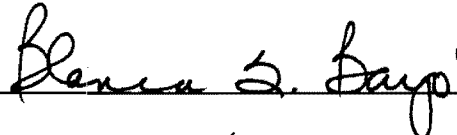
Therefore, we find that we should exercise our statutory grant of authority and, pursuant to Sections 120.69, 367.011 and 607.1406(9)-(15), Florida Statutes, file a petition in Circuit Court seeking to have the refund provisions of Order No. PSC-97-1147-FOF-WS enforced against either the shareholders or the directors of Martin Downs. Pending the final resolution of this Circuit Court action, this docket shall remain open.

Based on the foregoing, it is

ORDERED that this docket shall remain open pending the resolution of the proposed Circuit Court action discussed in the body of the order.

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By ORDER of the Florida Public Service Commission this 21st
day of August, 1998.

A handwritten signature in cursive script, reading "Blanca S. Bayó", is written over a horizontal line.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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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.

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 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.