

FLORIDA PUBLIC SERVICE COMMISSION
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August 28, 1997

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF WATER & WASTEWATER (IWENJIORA)
DIVISION OF AUDITING & FINANCIAL ANALYSIS (C. ROMIG)
DIVISION OF LEGAL SERVICES (JAEGER)

RE: DOCKET NO. 931065-WS - MARTIN DOWNS UTILITIES, INC. -
DISPOSITION OF CIAC GROSS-UP FUNDS
COUNTY: MARTIN

AGENDA: SEPTEMBER 9, 1997 - REGULAR AGENDA - PROPOSED AGENCY
ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\WAW\WP\931065WS.RCM

CASE BACKGROUND

As a result the repeal of Section 118(b) of the Internal Revenue Code (I.R.C.), contributions-in-aid-of-construction (CIAC) became gross income and were depreciable for federal tax purposes. In Order No. 16971, issued December 18, 1986, the Commission 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.

Orders Nos. 16971 and 23541, issued December 18, 1986 and October 1, 1990, respectively, require that utilities annually file information which would be used to determine the actual state and federal income tax liability directly attributable to the CIAC. The information would also determine whether refunds of gross-up would be appropriate. These orders require that all gross-up collections for a tax year, which are in excess of a utility's actual tax liability for the same year, should be refunded on a pro rata basis to those persons who contributed the taxes.

In Order No. 23541, the Commission required that any water and wastewater utility already collecting the gross-up on CIAC and wishing to continue, had to file a petition for approval with the

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Commission on or before October 29, 1990. Martin Downs Utilities, Inc. (MDU or utility) filed for authority to continue to gross-up on October 26, 1990. By Order No. 25360, issued November 19, 1991, MDU was granted authority to continue to gross-up using the full gross-up formula.

On September 9, 1992, this Commission issued Proposed Agency Action Order No. PSC-92-0961-FOF-WS, which clarified the provisions of Orders Nos. 16971 and 23541 for the calculation of refunds of gross-up of CIAC. On September 14, 1992, Order No. PSC-92-0961A-FOF-WS, was issued which included Attachment A which reflects the generic calculation form. No protests were filed, and the Order became final.

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

MDU's facilities were sold to Martin County on August 12, 1993. By Order No. PSC-93-1484-FOF-WS, in Docket No. 930818-WS, issued October 12, 1993 the Commission acknowledged the transfer of the water and wastewater facilities and canceled Certificates Nos. 343-W and 301-S. The records of the Department of State show that MDU was administratively dissolved as of August 25, 1995.

The disposition of CIAC gross-up collections was not addressed in Docket No. 930818-WS. However, the Commission has jurisdiction to address the disposition of gross-up collections even though the facilities have been sold to the County. See Charlotte County V. General Development Utilities, Inc., 653 So.2d 1081 (Fla. 1st DCA 1995), discussed below.

Therefore, Docket No. 931065-WS was opened on November 4, 1993 to address the disposition of excess gross-up funds collected for the period of October 1, 1989 through August 12, 1993. The Commission addressed the disposition of CIAC gross-up collections for the years ended December 31, 1987 through September 30, 1989, in Docket No. 910192-WS, Order No. 25388, issued November 25, 1991. Also, by letter dated November 23, 1993, staff advised the attorney that had been representing MDU that staff would address the collection of gross-up funds from October 1, 1989 through August 12, 1993. That letter referenced Orders Nos. 16971 and 23541.

At the May 30, 1995 Agenda Conference in the refund case of Canal Utilities, Inc. in Docket No. 941083-WS, questions were

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raised about whether or not staff's method of calculating refunds was contrary to the requirements of Order No. 23541 and the Commission's previous practice. Also at issue, among others, was how prior years' depreciation on CIAC should be handled in determining the refund, and the offsetting of above-the-line NOLs and ITCs with CIAC income. As a result of these issues, among others, staff was directed to hold workshops to discuss the current practices the Commission employed in dealing with the taxability of CIAC and to discuss viable alternatives. Staff was also directed to consider the need, if any, to change the Commission's current policy. In addition, processing of CIAC gross-up dockets were held in abeyance pending resolution of those issues.

On March 29, 1996, Docket No. 960397-WS was opened to review the Commission's 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. Pending the holding of these workshops and further guidance from the Commission on the proper handling of CIAC gross-up cases, staff temporarily delayed the processing of this type of cases.

By Order No. PSC-96-0686-FOF-WS, issued May 24, 1996, staff was directed to continue processing CIAC gross-up and refund cases pursuant to Orders Nos. 16971 and 23541; however, staff was also directed to make a recommendation to the Commission concerning whether the Commission's policy regarding the collection and refund of CIAC should be changed upon staff's completion of its review of the proposals and comments offered by the workshop participants. In addition, staff was directed to consider ways to simplify the process and determine whether there were viable alternatives to the gross-up.

However, the Small Business Job Protection Act of 1996 (The Act) was signed into law by President Clinton on August 20, 1996. The Act provided for the non-taxability of CIAC collected by water and wastewater utilities effective retroactively for amounts received after June 12, 1996. As a result, on September 20, 1996, in Docket No. 960965-WS, Order No. PSC-96-1180-FOF-WS was issued to revoke the authority of utilities to collect gross-up of CIAC and to cancel the respective tariffs unless, within 30 days of the issuance of the order, affected utilities requested a variance.

Because, there was no longer a need to review the Commission's policy to determine any changes, by Order No. PSC-96-1253-FOF-WS, issued October 8, 1996, the Commission closed Docket No. 960397-WS. However, as established in Order No. PSC-96-0686-FOF-WS, all pending CIAC gross-up refund cases are being processed pursuant to Orders Nos. 16971 and 23541. The purpose of this recommendation is

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to address the disposition of CIAC gross-up refunds for MDU for the period October 1, 1989 through August 12, 1993.

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DISCUSSION OF ISSUES

ISSUE 1: Should Martin Downs Utilities, Inc. be required to refund excess CIAC gross-up collections for the period October 1, 1989 through August 12, 1993?

RECOMMENDATION: Yes, the utility should refund \$54,425 which consists 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 the refund, for gross-up collected in excess of the tax liability resulting from the collection of CIAC. In accordance with Orders Nos. 16971 and 23541, all amounts should be refunded on a pro rata basis to those persons who contributed the taxes. The refund should be completed within six months of the effective date of the Order. The utility should submit copies of canceled checks, credits applied to monthly bills or other evidence which verifies that the refunds have been made, within 30 days from the date of the refund. Within 30 days from the date of the refund, the utility also should provide a list of unclaimed refunds detailing contributor and amount, and an explanation of the efforts made to make the refunds. Further, the utility should deliver any unclaimed refunds to the State of Florida Comptroller's Office as abandoned property. The unclaimed refunds should be delivered to the Comptroller's office following staff's written notification to the utility that the refunds have been made in accordance with the Commission's Order. No refund is necessary for 1992 and 1993, because the utility did not collect any CIAC. In addition, because the utility has been dissolved, a copy of the Order requiring refunds should be sent to Steve Fry, the representative of MDU, and MDU's last known counsel of record, F. Marshall Deterding. Also, a copy should be sent to the directors at their last known address. (IWENJIORA, C. ROMIG, JAEGER)

STAFF ANALYSIS: MDU was incorporated in the State of Florida in April 1981. Until January 26, 1990, MDU was a wholly-owned subsidiary of Southern Realty Group, Inc. (SRG). On January 25, 1990, MDU was recapitalized and then sold by SRG, to an entity controlled by certain SRG shareholders. On August 12, 1993, Martin County purchased the water and wastewater facilities from MDU. In this docket, staff addresses the disposition of CIAC gross-up monies collected for the period October 1, 1989 through August 12, 1993.

By Order No. PSC-93-1484-FOF-WS, issued October 12, 1993, the Commission canceled MDU's certificates and acknowledged the sale of the utility to an exempt governmental entity. One month later, on November 4, 1993, the Commission opened this docket to address any excess gross-up funds. In compliance with Order No. 16971, MDU

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filed its CIAC reports for the fifteen-month period October 1, 1989 through December 31, 1990 and for the year ended December 31, 1991. By letter dated November 23, 1993, 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. On December 16, 1993, the utility responded indicating that it disagreed with certain adjustments made by staff. Staff and the utility had several telephone discussions regarding the differences. As a result, by letter dated October 11, 1994, staff requested additional clarifying information. On January 12, 1995, the utility responded to staff's concerns with revised schedules and additional clarifying information.

By letter dated November 15, 1994, MDU's former shareholders inquired about whether the Commission had continuing jurisdiction over the CIAC gross-up refund now that the utility was being liquidated. By letter dated, November 29, 1994, counsel for the Commission advised MDU that the Commission still had jurisdiction over the CIAC gross-up funds.

MDU cited two orders in which the Commission acknowledged a sale and specifically addressed refunds associated with the utility. In Docket No. 940063-WS, involving Mid-Clay Services Corporation, Order No. PSC-94-0201-FOF-WS, issued February 18, 1997, canceled the utility's certificate. The order stated that a separate docket concerning the refund of excess 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." Order No. PSC-94-0198-FOF-WS, issued February 17, 1994, in Docket No. 940051-WS, addressed a similar situation. However, in this 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.

Staff does not believe that the Commission relinquished jurisdiction over MDU in Order No. PSC-93-1484-FOF-WS as it relates to the refund of CIAC gross-up. As stated in the Mid-Clay order cited above, the Commission retains jurisdiction over any matter which arose while the utility was under its jurisdiction. The gross-up funds were collected subject to refund prior to the cancellation of MDU's certificates. Even though the order did not explicitly address the disposition of the gross-up funds, pursuant to Orders Nos. 16971 and 23541, and under the Commission's general authority, the disposition of those funds remains in the purview of the Commission.

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The Commission's 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). 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.

Also, by letter dated July 2, 1997, staff asked MDU the following questions:

1. Are there any funds in the CIAC Tax Impact Account of MDU?
2. The CIAC Reports filed by MDU 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, 1993. (Corrected by telephone to 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,

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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.

In reviewing the response, staff does not agree with the assertions made in the first sentence of paragraph 2. above. Order No. PSC-93-1484-FOF-WS, issued on October 12, 1993, was an administrative order that 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. It did not address any continuing jurisdictional questions and said nothing about relinquishing jurisdiction. As stated previously (see staff analysis of the Charlotte County case above), staff does not believe that it was necessary for the October 12 Order to specifically retain jurisdiction or advise MDU that refunds of CIAC gross-up for the period from October 1, 1989, through the date of sale might be required. Section 367.011, Florida Statutes speaks for itself. 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, the Commission gave MDU ample notice that the funds in the CIAC Tax Impact Account were still subject to refund. Also, 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.

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Despite all this, 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.

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, Florida Statutes. However, staff does not know when the distribution was made, and it is unclear as to when the time began to run for holding the directors liable.

Regardless of the above, 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 effective date of dissolution appears to be August 25, 1995, and it appears that a proceeding against the shareholders could be brought as late as August 25, 1998.

Therefore, staff completed its analysis of the amount of CIAC gross-up funds that should be refunded. In every year reviewed, Staff made several adjustments to the utility's above-the-line computation. These adjustments are discussed below:

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STAFF ADJUSTMENTS:

Management Fees, Accounting, Legal and Engineering Expenses:
In its January 12, 1995 filing, for each year under consideration for gross-up refund disposition, the utility made adjustments to management fees, accounting, legal, and engineering expenses to reflect the amount that was established in its last rate case in Order No. 22869, issued April 27, 1990. In response, staff notes that the utility's annual reports for the period ended 1990 and 1991 show that the utility included the entire amount as regulatory expense. Further, when staff reviewed the utility's annual report to determine whether it was overearning, the entire amount was considered to be utility related and used and useful. For annual report review purposes, these expenses were included and considered when determining the utility's net income. The utility's officer attests to the accuracy of the annual reports by signing them each year. Therefore, staff believes that the entire amount should be included as above-the-line expense in calculating the utility's taxable income.

Based on the above, staff has adjusted the above-mentioned expenses to reflect the amount that is consistent with the amount reported in the annual report for each period. Staff's adjustment changed the utility's reported above-the-line taxable income/loss for both periods.

Depreciation Computed on Capacity Fees: Another difference between the utility's January 12, 1995 computation and Staff's computation, which is apparent in every year, is that the utility's calculation of first year depreciation expense is calculated based on the contributed property, and not capacity fees. The utility did not include the cash CIAC contributions in their calculation of depreciation, because cash is not depreciable property.

Rule 25-30.515(3), Florida Administrative Code defines CIAC as:

any amount or item of money, services, or property received by a utility, from any person or governmental agency, any portion of which is provided at no cost to the utility, which represents an addition or transfer to the capital of the utility, and which is utilized to offset the acquisition, improvement, or construction costs of the utility's property, facilities, or equipment used to provide utility services to the public. The term includes...system capacity charges, main extension charges and customer connection charges. (Emphasis added)

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By definition, CIAC charges are intended for plant and are to be utilized for the acquisition, or construction of utility property; therefore, staff believes it is appropriate to assume the cash CIAC was converted into property in determining the amount of depreciation expense.

According to the utility's annual report, the utility added \$3,167,750 of plant additions in 1990. The utility collected CIAC totaling \$2,140,990, which consisted of \$950,365 of property CIAC and \$1,190,625 of cash CIAC. Plant additions exceeded the property and cash CIAC collections. Staff subtracted the amount of property CIAC from the total plant additions to determine how much cash CIAC was converted into plant. The difference indicates that all cash CIAC was converted. Staff used the Modified Accelerated Cost Recovery System (MACRs) depreciation rates to calculate first year's depreciation expense based on the total CIAC collected. As a result, staff calculated the first year's depreciation to be \$64,167.

Further, according to the utility's annual report, the utility added \$829,982 of plant additions in 1991. The utility collected CIAC totaling \$1,073,666, which consisted of \$527,633 of property CIAC and \$546,033 of cash CIAC. Plant additions did not exceed the property and cash CIAC collections. Staff subtracted the amount of property CIAC from the total plant additions to determine how much cash CIAC was converted into plant. The difference indicates that only a portion of the cash CIAC was converted. Staff used the Modified Accelerated Cost Recovery System (MACRs) depreciation rates to calculate first year's depreciation expense based on the total property CIAC of \$527,633 and \$302,349 of the cash CIAC. As a result, staff calculated the first year's depreciation to be \$31,124.

Prior Years' CIAC Depreciation Classified Below-the-Line:
Finally, another difference between the utility's January 12, 1995 computation and staff's computation, which is apparent in every year, is based on the Commission's decision to classify all prior year CIAC depreciation expense below-the-line. In its filing the only CIAC depreciation that the utility placed below-the-line was non-used and useful depreciation. However, in accordance with the most recent Commission's decisions, staff reclassified the prior year CIAC depreciation as a below-the-line expense.

Staff has calculated the gross-up required to pay the tax liability resulting from the collection of taxable CIAC by grossing-up the net taxable CIAC amount, in accordance with the method adopted in Order No. PSC-92-0961-FOF-WS. Our calculations,

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taken from the information provided by the utility in its gross-up reports, supplemental information, and annual reports are reflected on Schedule No. 1. A summary of each year's refund calculation follows.

ANNUAL GROSS-UP REFUND AMOUNTS

1990

The utility's 1990 CIAC report covers a fifteen-month period from October 1, 1989 through December 31, 1990. During this period the utility changed tax year end, recapitalized, and was sold to an entity controlled by certain SRG shareholders.

The utility proposes a refund of \$3,854 for 1990 excess gross-up collections. The utility's refund is based on an above-the-line income of \$178,969, before the inclusion of the taxable CIAC in income.

Staff calculates a refund of \$32,361 for 1990, excluding accrued interest. Staff's calculation of above-the-line income includes the above-mentioned adjustments to the utility's above-the-line expenses. In its filing, the utility classified \$156,951 of its management fees and accounting, legal, and engineering expense below-the-line and \$138,249 as above-the-line expense. Staff reclassified the entire \$295,200 as above-the-line expense. The utility explained that its above-the-line amount agrees with the amount established in its last rate proceeding by Order No. 22869, issued April 27, 1990. In response, staff notes that the utility's annual report for 1990 and a prorated portion of the 1989 annual report shows that the utility included the entire \$295,200 above-the-line. When staff reviewed the utility's annual report to determine whether it was overearning, the entire amount was considered to be utility related and used and useful. For annual report review purposes, these expenses were included and considered when determining the utility's net income; therefore, staff believes that the entire amount should be included as above-the-line expense in calculating the utility's taxable income.

Based on the above, staff has adjusted the above-mentioned expenses to reflect \$295,200 as above-the-line expense. Staff's adjustment changed the utility's reported above-the-line taxable income of \$178,969 to an above-the-line income of \$69,306 before the inclusion of taxable CIAC income. Therefore, all taxable CIAC received during the year would be taxed, net of first year's depreciation and CIAC that was collected but not grossed-up pursuant to contracts entered into before January 1, 1987. The report indicates that a total of \$1,143,129 of gross-up monies was

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collected for the CIAC that was grossed-up. According to the copy of the utility's CIAC journal account, the utility received taxable CIAC of \$2,513,062 and deducted \$16,879 for the first year's depreciation. Staff deducted \$607,847 for CIAC that was not grossed-up and \$64,167 for the first year's depreciation on CIAC capacity and property collections. As a result, the net taxable CIAC was calculated to be \$1,841,048. Staff has used the 37.63% combined marginal federal and state tax rates as provided in the 1990 CIAC Report to calculate the tax effect of \$692,786. When this amount is multiplied by the expansion factor for gross-up taxes, the amount of gross-up required to pay the tax effect on the CIAC is calculated to be \$1,110,768.

Based upon the foregoing, staff calculates a refund of \$32,361 for 1990. This amount does not include the accrued interest which also must be refunded as of December 31, 1990 to the date of the refund. In accordance with Orders Nos. 16971 and 23541, all amounts should be refunded on a pro rata basis to those persons who contributed the taxes. The refund should be completed within six months.

However, staff notes that the Liquidating Trust, pursuant to Mr. Fry's July 25, 1997 letter, was terminated in late 1996. Also, that same letter indicated that neither MDU nor the Liquidating Trust has any assets or employees. The utility should submit copies of canceled checks, credits applied to monthly bills or other evidence which verifies that the refunds have been made, within 30 days from the date of the refund. Within 30 days from the date of the refund, the utility also should provide a list of unclaimed refunds detailing contributor and amount, and an explanation of the efforts made to make the refunds. Further, the utility should deliver any unclaimed refunds to the State of Florida Comptroller's Office as abandoned property. The unclaimed refunds should be delivered to the Comptroller's office following staff's written notification to the utility that the refunds have been made in accordance with the Commission's Order.

Because the utility has been dissolved, a copy of the Order requiring refunds should be sent to Steve Fry, the representative of MDU, and MDU's last counsel of record, F. Marshall Deterding. Also, a copy should be sent to the former directors at their last known address.

1991

The utility proposes a refund of \$15,234 for 1991 excess gross-up collections. The utility's refund is based on an above-

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the-line income of \$63,790, before the inclusion of the taxable CIAC in income.

Staff calculates a refund of gross-up collections for 1991 of \$27,576, excluding accrued interest. Staff calculated an above-the-line income of \$42,488, before the inclusion of the taxable CIAC in income. Staff's calculation included adjustments to the utility's above-the-line management fees and accounting, legal, and engineering expenses. In its filing, the utility classified \$100,390 of these expenses below-the-line and \$99,324 as above-the-line expense. Staff classified the entire \$199,714 as above-the-line expense. The utility explained that its above-the-line amount agrees with the amount established in Order No. 22869, issued April 27, 1990. In response, staff notes that the utility's annual report for 1991 shows that the utility included the entire \$199,714 above-the-line. When staff reviewed the utility's annual report to determine whether it was overearning, the entire amount was considered to be utility related and used and useful. For annual report review purposes, these expenses were included and considered when determining the utility's net income; therefore, staff believes that the entire amount should be included as above-the-line expense in calculating the utility's taxable income.

Based on the above, staff has adjusted the above-mentioned expenses to reflect \$199,714 as above-the-line expense. Staff's adjustment changed the utility's reported above-the-line taxable income of \$63,790 to an above-the-line income of \$42,488. The report indicates a total of \$528,593 of gross-up collections were received for the CIAC collections that were grossed-up. Taxable CIAC of \$1,073,665 was received and the utility deducted \$19,786 for the first year's depreciation. Staff deducted \$202,992 for CIAC that was not grossed-up pursuant to contracts entered into before January 1, 1987. As a result, the utility collected gross-up on \$870,673 of taxable CIAC. Staff has reduced this amount by \$31,124 for first year's depreciation on capacity and property CIAC collections. As a result, taxable CIAC has been calculated to be \$839,549.

Staff has used the 37.63% combined marginal federal and state tax rates as provided in the 1991 CIAC Report to calculate the tax effect of \$315,922. When this amount is multiplied by the expansion factor for gross-up taxes, the amount of gross-up required to pay the tax effect on the CIAC is calculated to be \$506,529. Based upon the foregoing, staff calculates a refund of \$22,064 for 1991. This amount does not include the accrued interest which also must be refunded from December 31, 1991 to the date of the refund. In accordance with Orders Nos. 16971 and 23541, all amounts should be refunded on a pro rata basis to those

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persons who contributed the taxes. The refund should be completed within six months. The utility should submit copies of canceled checks, credits applied to monthly bills or other evidence which verifies that the refunds have been made, within 30 days from the date of the refund. Within 30 days from the date of the refund, the utility also should provide a list of unclaimed refunds detailing contributor and amount, and an explanation of the efforts made to make the refunds. Further, the utility should deliver any unclaimed refunds to the State of Florida Comptroller's Office as abandoned property. The unclaimed refunds should be delivered to the Comptroller's office following staff's written notification to the utility that the refunds have been made in accordance with the Commission's Order.

Because the utility has been dissolved, a copy of the Order requiring refunds should be sent to Steve Fry, the representative of MDU, and MDU's last counsel of record, F. Marshall Deterding. Also, a copy should be served on the former directors at their last known address.

1992 and 1993

Mr. James H. Anderson, Vice President of MDU filed an affidavit which stated that the utility ceased collecting CIAC gross-up monies after December 31, 1991. Therefore, no refund is necessary.

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ISSUE 2: Should the docket be closed?

RECOMMENDATION: No, upon expiration of the protest period, if a timely protest is not filed by a substantially affected person, the docket should remain open pending verification of the refund. Staff should be granted administrative authority to close the docket upon verification that the refunds have been made. (IWENJIORA, JAEGER)

STAFF ANALYSIS: Upon expiration of the protest period, if a timely protest is not filed by a substantially affected person, the docket should remain open pending verification of the refund. Staff should be granted administrative authority to close the docket upon verification that the refunds have been made.

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SCHEDULE NO. 1
 MARTIN DOWNS UTILITIES, INC.

STAFF CALCULATED GROSS-UP REFUND

	1990	1991	1992
1 A-T-L Taxable Income Per Staff	\$ 3,708,618	\$ 1,624,960	\$ N/A
2 Less CIAC	(2,513,062)	(1,073,665)	
3 Less Gross-up Collected	(1,143,129)	(528,593)	
4 Add First Year's Depr. on CIAC	16,879	19,786	
5 Add/Less Other Effects	0	0	
6			
7 Adjusted Income Before CIAC and Gross-up	\$ 69,306	\$ 42,488	\$
8			
9 Taxable CIAC	\$ 2,513,062	\$ 1,073,665	\$
10			
11 Taxable CIAC Resulting in a Tax Liability	\$ 1,905,215	\$ 870,673	\$
12 Less First Year's Depr.	(64,167)	(31,124)	
13			
14 Net Taxable CIAC	\$ 1,841,048	\$ 839,549	\$
15 Combined marginal state and federal tax rate	37.63%	37.63%	
16			
17 Net Income Tax on CIAC	\$ 692,786	\$ 315,923	\$
18 Less ITC Realized	0	0	
19			
20 Net Income Tax on CIAC	\$ 692,786	\$ 315,923	\$
21 Expansion Factor for gross-up taxes	1.603334937	1.603334937	
22			
23 Gross-up Required to Pay Tax Effect	\$ 1,110,768	\$ 506,530	\$
24 Less CIAC Gross-up Collected	(1,143,129)	(528,593)	
25			
26 (OVER) OR UNDER COLLECTION	\$ (32,361)	\$ (22,063)	\$
27	=====	=====	=====
28			
29 TOTAL YEARLY REFUND	(32,361)	(22,063)	
30	=====	=====	=====
31			
32 PROPOSED REFUND (excluding interest)	(54,425)		
33	=====		