



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECORDS AND REPORTING
OCT - 7 AM 10:20
REC'D - ED - FPSC

DATE: OCTOBER 7, 1999

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

FROM: DIVISION OF LEGAL SERVICES (JAEGER) *RD CSM 103*
 DIVISION OF AUDITING AND FINANCIAL ANALYSIS (C. PROMIG) *WBM*
 DIVISION OF WATER AND WASTEWATER (IWENJIORA) *PD BL*

RE: DOCKET NO. 931065-WS - DISPOSITION OF CONTRIBUTIONS-IN-AID-OF-CONSTRUCTION (CIAC) FUNDS RECEIVED BY MARTIN DOWNS UTILITIES, INC. IN MARTIN COUNTY DURING 1990, 1991, 1992, AND 1993.

AGENDA: 10/19/99 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\931065CD.RCM

CASE BACKGROUND

Martin Downs Utilities, Inc. (Martin Downs or utility) was incorporated in the State of Florida in April 1981. Until January 26, 1990, Martin Downs was a wholly-owned subsidiary of Southern Realty Group, Inc. (SRG). 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 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

DOCUMENT NUMBER-DATE

12123 OCT-7 99

FPSC-RECORDS/REPORTING

DOCKET NO. 931065-WS
DATE: OCTOBER 7, 1999

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.

On August 12, 1993, Martin County purchased the water and wastewater facilities from Martin Downs. 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 and canceled Certificates Nos. 343-W and 301-S. The records of the Department of State show that Martin Downs was administratively dissolved as of August 25, 1995.

By letter dated November 15, 1994, Martin Downs's former shareholders inquired about whether the Commission had continuing jurisdiction over the CIAC gross-up refund since 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 the first Order, Order No. PSC-94-0201-FOF-WS, issued February 18, 1997, in Docket No. 940063-WS, the Commission acknowledged the sale of Mid-Clay Service Corp. to Clay County, and canceled the utility's certificate. The order noted that a separate docket concerning the refund of excess gross-up funds had been opened, and specifically stated, "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 second Order, Order No. PSC-94-0198-FOF-WS, issued February 17, 1994, in Docket No. 940051-WS, the Commission acknowledged the sale of Clay Utility Company to Clay County, and again noted that a docket regarding the refund of excessive CIAC gross-up collections had been opened. In this case also, the Commission asserted that it had jurisdiction over the CIAC gross-up. However, in the case at hand, 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, staff counsel advised Martin Downs that, in his opinion, the Commission still had jurisdiction over the CIAC gross-up funds. As stated in the Mid-Clay order cited above, staff believes the Commission retains jurisdiction over any matter which arose while the utility was under its jurisdiction. The gross-up funds were collected subject

DOCKET NO. 931065-WS
DATE: OCTOBER 7, 1999

to refund prior to the cancellation of Martin Downs'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, staff believed that the disposition of those funds would remain in the purview of the Commission.

The disposition of CIAC gross-up collections was not addressed in Docket No. 930818-WS. However, in Order No. PSC-97-1147-FOF-WS issued in this docket, the Commission asserted that it had jurisdiction to address the disposition of gross-up collections even though the facilities had been sold to the County. In that Order, the Commission, citing Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995), determined that it had continuing jurisdiction because the CIAC gross-up funds were collected prior to the sale to the County.

In the Charlotte County case, the 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.

Staff opened Docket No. 931065-WS 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. Also, by letter dated November 23, 1993, staff advised the attorney that had been representing Martin Downs 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 (orders governing CIAC gross-up).

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 case. However,

DOCKET NO. 931065-WS
DATE: OCTOBER 7, 1999

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.

On August 27, 1997, staff filed its recommendation concerning the disposition of the CIAC gross-up funds collected by the utility from October 1, 1989 through August 12, 1993. The Commission considered this recommendation at the September 9, 1997 Agenda Conference and issued Proposed Agency Action (PAA) Order No. PSC-97-1147-FOF-WS on September 30, 1997.

That PAA Order became final and required the utility 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. It 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 utility was to submit copies of cancelled checks, credits applied to monthly bills or other evidence that verified that the utility has 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.

However, the utility never made any refunds and all funds were dispersed to the shareholders several years ago. At the August 4, 1998 Agenda Conference, the Commission addressed the question of whether it should take additional action "to seek to enforce its Order requiring refunds of excess CIAC gross-up collections for the period October 1, 1989 through August 12, 1993." By Order No. PSC-98-1116-FOF-WS issued August 21, 1998, the Commission stated:

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

DOCKET NO. 931065-WS
DATE: OCTOBER 7, 1999

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.

Pursuant to that Order, a Petition to Enforce Final Order was filed in the Nineteenth Judicial Circuit (Circuit Court) in and for Martin County on August 20, 1998. The purpose of this recommendation is to address the status of the Circuit Court action, and what further actions, if any, the Commission should take.

DOCKET NO. 931065-WS
DATE: OCTOBER 7, 1999

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission take any further action to seek to enforce its Order requiring refunds of excess CIAC gross-up collections for the period October 1, 1989 through August 12, 1993?

RECOMMENDATION: No, the Commission should take no further action, and this docket should be closed. (IWENJIORA, C. ROMIG, JAEGER)

STAFF ANALYSIS: As stated above, pursuant to Order No. PSC-98-1116-FOF-WS, issued August 21, 1998, staff filed a Petition to Enforce Final Order (Petition) in the Circuit Court on August 20, 1998. The Petition was assigned Case No. 98-652-CA. Because no response was filed to this Petition, staff filed its Motion For Default on August 2, 1999, and a Default was entered on August 4, 1999.

When this action was originally filed, staff was aware of the problems that the Commission had in trying to enforce an Order requiring refunds against Sunnyland Utilities, Inc., in Docket No. 860149-WU. That docket was opened on April 16, 1986, and by Order No. 20217, issued October 6, 1988, the Commission ordered the utility to make refunds. The utility did not make the refunds, and the Commission filed a petition for enforcement in Circuit Court on June 23, 1989. This petition was dismissed (for failure to prosecute) by the Circuit Court on March 16, 1992, and the docket was finally closed by Order No. PSC-96-1354-FOF-WS, issued November 18, 1996, without any refunds having ever been made.

However, in the Sunnyland case, both the utility and the individual who had personally guaranteed any refunds had been declared bankrupt (and their debts discharged), and there was never any distribution made to shareholders. In the case at hand, there appeared to be an improper distribution made to shareholders, and staff believed that we would be able to locate either the shareholders or the directors of Martin Downs. However, after searching the Internet and making inquiries with the Department of State, staff has been unable to locate any shareholders or directors.

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

DOCKET NO. 931065-WS
DATE: OCTOBER 7, 1999

dissolution appears to be August 25, 1995, and it appears that the proceeding in this case was initiated in a timely manner (initiated on August 20, 1998).

However, because staff has been unable to locate any of the shareholders, staff can discern no further action that the Commission can take in this matter. Further, the debt is not to the Commission, but to the customers or developers who paid the CIAC gross-up. Therefore, the Commission cannot forward the debt to the Office of the Comptroller for collection. In consideration of all the above, staff recommends that this docket be closed.