



Public Service Commission

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

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DATE: October 9, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK
ADMINISTRATIVE SERVICES (BAYO)

FROM: OFFICE OF THE GENERAL COUNSEL (HOLLEY) *JAM West*
DIVISION OF ECONOMIC REGULATION (KUMMER) *SK 192*

RE: DOCKET NO. 021051-EI - COMPLAINT OF THE LINKS HOMEOWNERS ASSOCIATION, INC. AGAINST TAMPA ELECTRIC COMPANY, REQUEST FOR INVESTIGATION, AND REQUEST FOR DETERMINATION **THAT** THE LINKS IS NOT RESPONSIBLE FOR MONIES TECO CLAIMS ARE DUE AND OWING.

AGENDA: 10/21/03 - REGULAR AGENDA - INTERESTED PERSONS **MAY** PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\021051.RCM

CASE BACKGROUND

This recommendation addresses a complaint filed by The Links Homeowners Association (The Links) against Tampa Electric Company (TECO), for improperly billing it for streetlight service for the period of March 1999 through October 2001. Specifically, The Links requests that the Commission investigate this matter and determine that The Links is not responsible for the monies TECO claims to be due and owing. The amount in question is \$8,874.19, which includes \$6,311.72 for lighting service from March 3, 1999 through February 3, 2001, which was incorrectly billed to another entity; \$1,984.97 for lighting service from February 23, 2001 to October 1, 2001, which was billed directly to The Links; and \$577.50 for late fees. TECO responded to The Links' formal complaint, stating the **masons** it believes why The Links is responsible for the **money** owed.

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Staff has investigated this complaint by requesting additional information from the parties, as well as by conducting two conference calls with the parties in order to discuss the facts of the complaint and to explore the possibility of mediation to resolve it. Subsequent to these conference calls, written responses were received from both parties. Following the first call on January 31, 2003, TECO indicated that the nature of the dispute did not lend itself to mediation, since the underlying question was one of liability for payment. The Links likewise declined mediation.

Staff filed its first recommendation on April 3, 2003, for the April 15, 2003 Agenda Conference. Staff's April 3, 2003, recommendation was deferred because prior the April 15 Agenda Conference, staff received additional information from The Links, including an affidavit from Ms. Dee Ann King, disputing statements made in the recommendation. Staff requested a response to the affidavit from TECO. TECO declined to address specific points raised in the affidavit but reiterated the basic position that The Links had received benefit of the lights and were therefore responsible for the payment. In an effort to clarify certain points and to explore all possible settlement avenues, staff held a second conference call with the parties on June 18, 2003. At the conclusion of that conference, parties still were not able to reach a settlement. TECO was asked to provide additional information and The Links was invited to submit any additional information it felt would assist staff in its analysis. On July 22, 2003, a letter from General Counsel Harold McLean strongly urged both parties to take advantage of mediation to settle the dispute rather than take the matter before the Commission. TECO contacted David Smith and indicated their willingness to participate in mediation. The Links did not respond.

Since it appears there is no movement by the parties to an agreement, Staff is now bringing this revised recommendation to the Commission to address the issue of whether The Links is responsible for the monies TECO claims to be due and owing. The Commission has jurisdiction to consider this matter pursuant to Section 350.05(1), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission find that The Links is responsible for monies that TECO claims are due and owing?

RECOMMENDATION: Yes. The Commission should find that The Links is responsible for the amount of \$8,874.19 owed to TECO for lighting service provided to the community for the period of March 1999 through October 2001. (KUMMER, HOLLEY)

STAFF ANALYSIS: The positions of the parties are as follows:

The Links

The Links is a community of approximately 103 homes, the average value of each being approximately \$250,000. The Links' complaint alleges that it was improperly billed by TECO for streetlight service for the period of March 1999 through October 2001. The Links maintains that it did not request the lights and therefore is not responsible for paying for them. According to the Links, the developer was responsible for establishing a special lighting tax district to assume the responsibility for the lighting for each of the communities, and that a special taxing district was not recognized by Hillsborough County for The Links until October 2001.

The Links indicated that the Homeowners Association was incorporated on December 19, 1995. The developer, Brandon Property Partners, LTD. (BPP), turned over the community functions to the resident members of the Homeowners Association in 1998. The Links maintains that at no time was it involved in the request for the lights or in the establishment of the special lighting tax district with the County because that was the responsibility of the developer. The Links further states that after the 1998 turnover, the developer ceased to pay for any services of the Association, and there is no record that the Association assumed any maintenance contracts from the developer.

TECO

TECO states that in 1996, fifteen streetlights were installed at the request of BPP, for the subdivision then named "Bloomingdale AA/GG Unit 3 Phase 2," later designated as The Links. The lights were originally billed to an account in the name of BPP. On March

2, 1999, at the request of a representative of BPP, the name on the account was changed to Bristol Green Homeowners Association (Bristol Green), at the same billing address. On March 2001, TECO was notified by a representative of Bristol Green that **it** was receiving two streetlighting bills - one from the special taxing district set up by the BPP with Hillsborough County, and a second bill from TECO. Upon investigation, **it** became apparent that the streetlights being billed to Bristol Green by TECO were, in fact, located in and serving The Links community. TECO then refunded the improperly billed amount of \$6,311.72 to Bristol Green and **billed** The Links both for the amount refunded to Bristol Green and for ongoing service, beginning in March 2001.

TECO states that in early April 2001, after the first bill was received by The Links, a Ms. Dee Anne King **contacted** TECO and indicated that The Links did not have the money currently budgeted for the bill. TECO also stated in its response that credit arrangements were made with another representative of The Links to cover current monthly charges and contribute \$525 per month towards the amount in arrears. However, TECO notes that **no** payments **were** received, either for current service or for any past due amount through the end of 2001. TECO subsequently turned the account over to Allied Interstate, a collection agency, in January 2002.

After being contacted by the collection agency, The Links attorney, Mr. Mezer, attempted on two separate occasions to contact TECO by mail, but received no response from **the** utility. TECO contends that **it** never received any correspondence from The Links. In October, 2002, The Links filed a formal complaint with the Commission.

Staff Analysis

At issue is the responsibility for payment of \$8,874.19 **for** the streetlights for the time period of March 1999, when the lights began being billed to Bristol Green, through October 2001, when the Special Lighting Tax District became operative. Since the inception of the Special Lighting Tax District, the bills have been kept current. Below is staff's understanding of the chronology of events:

DATE: March, 20, 2003

DATE	EVENT
December 1995	Articles of Incorporation filed by The Links Homeowners Association with The Florida Department of State.
July 2, 1996	Contract signed with TECO to install 15 100-Watt HPS Cobra Street Lights Rate 672 for the subdivision then named "Bloomingdale AA/GG Unit 3 Phase 2," a portion of which was later re-designated as The Links. Billing for lights was under the name of the developer, BPP.
1996 through March 1, 1999	Billing for lights paid by BPP.
1998	The developer, BPP, turned over the community functions to The Links Homeowners Association.
March 2, 1999	TECO received request that the name on the account be changed to Bristol Green, a neighboring subdivision to The Links, but within the Bloomingdale development.
March 3, 1999 through February 2001	Bristol Green residents improperly paid for the 15 lights that were located within The Links subdivision, not Bristol Green subdivision.
April 2001	Upon investigation and determination that Bristol Green had been improperly billed for lights not located within its territory, TECO refunded \$6,311.72 to Bristol Green.
March 2001	TECO billed The Links \$6,599.25, which included the adjustment for the previous lighting service the subdivision received, but did not pay , and the first month's charge going forward.
April 2001	Questioning the charge, a representative from The Links contacted TECO, and TECO represents that arrangements were made for payment plan of the amount in arrears.
February 2001 through October 2001	Payments for past due amounts were not made, nor were payments made for amounts going forward.
October 2001	Hillsborough County established a special taxing district for the lights in question, and took over payment as of October 1, 2001.
January 2002	TECO turned over unpaid account to a collection agency.

As stated previously, staff conducted a conference call with the parties on January 31, 2003 to discuss the facts of the complaint and to explore the possibility of mediation to resolve it. Pursuant to that conference call, TECO affirmed that upon the

complaint from Bristol Green, it reviewed the location of the street lights and determined that they appeared to be all within The Links community. Also pursuant to that conference call, The Links did not dispute the assertion that the streetlights in question were serving The Links community.

Since the problem was first identified when Bristol Green noted the billing error, staff asked TECO why it did not attempt to bill BPP, the customer of record immediately prior to the transfer to Bristol Green. TECO stated that it attempted to do so at the time Bristol Green informed TECO that it was not responsible for the lights. However, BPP no longer had any accounts with TECO. When TECO contacted the property management company at the billing address of the former customer, BPP, TECO was informed **that** the lights were the responsibility of The Links Homeowners Association. The property management company also provided TECO with billing information for The Links.

During the second conference call, TECO stated that the name change on the Links' account was verified, **as** are any requested changes to utility accounts. TECO stated that the customer representative on this account personally knew the person requesting the change and had no reason to believe the change in name to The Links was inappropriate. Copies of TECO's Customer Activity log indicate that the customer of record information on the account was modified five times. Three of the entries changed the billing address and were accompanied by written documentation. The fourth entry changed the name to Bristol Green and was done by fax. The fifth entry changed the name on the account to The Links, and indicated that the change was requested by Ms. Dee Anne King.

The Links makes three basic assertions to support their denial of payment: (1) The Links did not contract for the lights; (2) It was The Links' understanding that a special lighting tax district was to be set up by the developer to pay for the lights; and (3) The Links does not have the legal authority to **assess** its members for the cost of streetlights. Therefore, The Links concludes that it bears no responsibility for any costs associated with the lights.

It appears that both TECO and The Links agree that the developer was responsible for establishing a county special lighting tax district to pay for the streetlights. However, the parties diverge on who is responsible for the bills for the period between

the time the developer ceased to pay the bill through when the special district was approved and the county began paying.

Contract for lights. One of the tenets upon which The Links bases its refusal to pay is that The Links, as presently constituted, did not request the installation of the lights. Following the second conference call on June 18, TECO provided a copy of the original contract requesting the lights at issue. TECO also provided the Articles on Incorporation filed with the Florida Department of State establishing the Links Homeowners Association, Inc. The signature on the Articles of Incorporation, dated December 19, 1995, belongs to Glen E. Cross, who is designated as the Agent for The Links, and it appears to be identical to the signature on the TECO lighting contract dated July 2, 1996, requesting installation of the street lights.

This supports TECO's assumption that Mr. Cross, as the legal representative of The Links at the time, entered into the contract for the lights on behalf of the homeowners' association. The lighting contract specifically states that the terms of the contract "shall inure to the benefits of and be binding upon the respective successors and assignees of the parties thereto." If Mr. Cross contracted for the lights on behalf of The Links in 1995, the obligations associated with those lights followed the transfer of control to the homeowners who subsequently took control of The Links in 1999. The fact that none of the current members of the homeowners' association physically signed the original contract, or even that the developer failed to specifically inform the homeowners of the lighting agreement, is immaterial in determining responsibility for payment of the account.

Taxing District. The second leg of The Links argument asserts that it was the developer's responsibility to establish the tax lighting district with the county. During the second conference call, The Links indicated that, in fact, The Links community was developed in phases and a special lighting district was established for part of the street lights installed in the community. Therefore, it had no reason to believe that any streetlights would be handled differently.

In response to staff's informal inquiries, TECO provided a description of the process by which a county lighting district is formed. According to TECO, a developer typically creates a homeowners' association for a new development and, as president,

executes a lighting agreement with the utility during construction. The developer continues to pay for the lighting until one of two criteria is met: 1) the subdivision is 51% occupied/owned by residents of that homeowners' association or, 2) the county has approved the establishment of a taxing district for the association or subdivision. Until one of these conditions is met, the developer charges the residents of the homeowners association their pro rata share of all of the association's expenses, including the cost of street lighting. When majority ownership belongs to the residents, the developer relinquishes control of the association. Once control shifts to the residents, the responsibility for all expenses also shifts to the homeowners' association.

To form a county lighting tax district, the developer submits a subdivision plat to the County by December 31st of each year with the request to establish a special lighting district for each subdivision or plat. In February of the following year, the County makes its decision on whether to approve the requests. If approved, the special districts become effective the following October. The county then notifies TECO in writing of its intent to assume the billing of particular lighting accounts. TECO then changes the name from the developer to the appropriate lighting tax district on October 1. According to information provided by TECO, from the time the lights are installed until the special lighting district is effective, the homeowners' association is responsible for payment of the lights. Unless TECO receives official notification from the county that a special district has been approved for a particular subdivision, TECO has no authority to bill the county for those accounts. In this case, TECO was notified in February 2001 that The Links was qualified as a special district. TECO began billing the county, according to procedure, in October 2001.

Staff spoke to a representative of Hillsborough County who indicated that either the developer or the serving utility could request the special taxing district be activated. TECO maintains however, that it does not initiate lighting tax districts. Rather, it requires the developer to contact the county when it is ready to turn over the lighting account and TECO takes no action until notified by the county to change the billing party.

Legal right to assess members. During the June 18 conference call, The Links raised the issue that the homeowners' association under its charter, had no legal right to assess its members for the installation or maintenance of street lights. The Links noted that

there are no common facilities such as a clubhouse or pool and the association exists primarily to enforce deed restrictions and covenants. TECO disputes the assertion that the Links cannot **assess** members to pay for street lights. In its written response following the call, TECO notes the Links was incorporated under Chapter 617, Florida Statutes, which enables it to "make contracts and incur liabilities, borrow money. . . issue its notes, bonds and other obligations and secure any of its obligations by mortgage and pledge of all or any of its property franchises or income. . ." Section 617.0302, Florida Statutes. TECO further cites from Article III of the Links' Articles of Incorporation that the association has the power to make and collect assessments from its members. From this, TECO concludes that "[t]here can be no reasonable doubt as to the authority of the Links, as a Florida Not For Profit Corporation to contract with Tampa Electric for lighting service and to compel the members of the Association to pay the Commission-approved tariff charges for that service."

Summary Rule 25-6.106(1), Florida Administrative Code, states that a utility may backbill a customer for a period of **up** to twelve months for any undercharge in billing which is the result of the utility's mistake. In this situation, staff does not believe that the undercharge in billing was a result of TECO's mistake. The customer of record (through its management company) requested that the name on the account be changed to Bristol Green in 1999. TECO had no apparent reason to doubt the accuracy of this change until it was brought to the utility's attention in 2001 by Bristol Green. At that time TECO contacted the same management company and was told that The Links was responsible for the account. Similarly, staff believes another mistake likely occurred when the developer failed to seek approval of a special lighting tax district in a timely manner so that the account for the streetlights could be transferred to the county. Neither of these errors was under TECO's control. Thus, staff does not believe that Rule 25-6,106(1), Florida Administrative Code, applies to this situation.

Staff continually returns to one apparently undisputed fact - The Links has been receiving the benefit of the lights during the periods in question through today. The Links' argument that it did not request the installation of the lights does not negate their responsibility for the contract entered into on their behalf by the developer. The person listed as the principal of The Links on its incorporation papers (Mr. Cross) appears to be the same person who contracted for the lights for the area later designated as the Links

community a few months later. Under the terms of the contract, the obligation of the contract enures to any assignees or successors. The argument that The Links is not responsible because none of the current homeowners signed the contract is unsupported. Residents and officers of every organization change over time but the organization remains bound by the terms of contracts signed by the duly recognized representatives at the time the contract is signed.

The argument that the Links is not responsible because the developer is responsible for establishing the special tax lighting district is also not persuasive. The position is also contrary to the information that was provided by TECO in its response to staff's inquiry, which states that under the procedure for forming special lighting tax districts, the homeowners' association is responsible until the special district is approved by the county. TECO's position is consistent with the language in the contract that the successors or assignees of the party to the original contract are responsible for meeting the terms of the contract, including payment of the bill. The fact that the developer failed to fulfill his obligation to The Links likewise does not automatically translate into the current members of The Links abrogation of the contract with TECO.

Given that TECO has already properly refunded the amount incorrectly billed to Bristol Green, that balance, along with the service billed between March 2001 through October 2001 remains a cost to the utility. If the amount is not recovered, it must be charged to bad debt expense. Bad debt is a cost shared by all of a utility's ratepayers. In addition, requiring TECO to absorb the cost of these lights under these conditions sets a potentially dangerous precedent. Other builders will quickly learn that they can avoid paying for street lights in a subdivision by employing a shell game of responsibility. While the amount in dispute in this case is relatively small, the amounts could quickly rise to significant levels for a larger development or if several developers employ the tactic.

For the reasons stated above, staff recommends that the Commission should find that The Links is responsible for the amount of \$8,874.19 owed to TECO for lighting service provided to the community for the period of March 1999 through October 2001.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation, this docket should be closed upon the issuance of a consummating order, provided that no substantially affected person files a 'protest within 21 days of the issuance **of** the Order.
(HOLLEY)

STAFF ANALYSIS: If the Commission approves staff's **recommendation**, this docket should be closed upon the issuance of a consummating order, provided that no substantially affected person files a protest within 21 days of the issuance of the Order.