



Public Service Commission

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RECORDS AND REPORTING

DATE: MAY 4, 2000

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

FROM: DIVISION OF LEGAL SERVICES (JAEGE) *JAEGE*
 DIVISION OF WATER AND WASTEWATER (IWENJIORA) *IWENJIORA*
 DIVISION OF AUDITING AND FINANCIAL ANALYSIS (ROMIG)

RE: DOCKET NO. 980954-WS - DISPOSITION OF CONTRIBUTIONS-IN-AID-OF-CONSTRUCTION (CIAC) GROSS-UP FUNDS COLLECTED DURING THE YEARS 12/31/92 THROUGH 12/31/96 BY JJ'S MOBILE HOMES, INC. IN LAKE COUNTY.

AGENDA: 05/16/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\980954.RCM

CASE BACKGROUND

JJ's Mobile Homes, Inc. (JJ's or utility), was a Class C utility located in Lake County, Florida. JJ's provided water and wastewater service to approximately 278 water and wastewater customers in the City of Mt. Dora, Florida (City). Its 1995 annual report reflected gross operating revenues of \$136,790 and \$138,025 for water and wastewater, respectively, and net operating losses of \$60,567 and \$45,929 for water and wastewater, respectively.

On July 9, 1996, the utility and City filed a joint application for transfer of the utility to a governmental authority, pursuant to Section 367.071(4)(a), Florida Statutes. The contract for the sale between JJ's and the City was made on June 21, 1996, with closing and transfer of all water and wastewater assets effective July 3, 1996. By Order No. PSC-96-1245-FOF-WS, issued October 7, 1996, in Docket No. 921237-WS, the

DOCUMENT NUMBER-DATE

05577 MAY-48

FPSC-RECORDS/REPORTING

Commission acknowledged the transfer of the water and wastewater assets of JJ's to the City and canceled Certificates Nos. 298-W and 248-S.

Prior to this transfer, by Order No. PSC-92-0777-FOF-WS, issued August 10, 1992, in Docket No. 920032-WS, the Commission had authorized JJ's to gross-up using the full gross-up formula. The authorized CIAC gross-up was subject to refund and, pursuant to Orders Nos. 16971 and 23541, issued December 18, 1986 and October 1, 1990, respectively, in Docket No. 860184-PU, could only be used to pay the actual tax liability incurred by the utility associated with its reception of contributions-in-aid-of-construction (CIAC). CIAC gross-up was to be placed in a special account and withdrawn only to pay the actual income tax liability or to make refunds as required.

The disposition of gross-up collections was not addressed in Docket No. 921237-WS. However, the Commission determined that it had jurisdiction to address the disposition of CIAC gross-up collections even though the facilities had been sold to the City. See Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995), determining that the Commission had jurisdiction over a rate dispute between a county and a water utility involving alleged overcharges to the county for water service occurring before transfer of the utility's water facility to the city. Therefore, this docket, Docket No. 980954-WS, was opened on July 28, 1998 to address the disposition of excess CIAC gross-up collections for the years 1992 through 1996.

By Proposed Agency Action (PAA) Order No. PSC-99-2369-PAA-WS, issued December 6, 1999, in this docket, which Order was consummated by Order No. PSC-99-2542-CO-WS, issued December 29, 1999, the Commission ordered JJ's to refund \$3,387 for 1992, \$1,559 for 1993, \$6,070 for 1994, and \$448 for 1995, for a total of \$11,464 plus accrued interest through the date of the refund, for gross-up collected in excess of the tax liability resulting from the collection of taxable CIAC. In addition, the Commission ordered the utility to refund \$6,353 for 1994 and \$6,918 for 1995 for a total of \$13,271 plus accrued interest through the date of the refund, for the unauthorized collection of gross-up on meter fees. Order No. PSC-99-2369-PAA-WS required that all refunds be completed within two months of the effective date of that Order. Pursuant to the Consummating Order, the effective date was December 29, 1999, and so all refunds should have been completed on February 29, 2000. However, at the time of this recommendation, there was no indication that JJ's had made the refunds as required. This recommendation addresses whether JJ's should be ordered to show

DOCKET NO. 980954
DATE: MAY 4, 2000

cause, in writing within 21 days, why it should not be fined up to \$5,000 per day for failure to make refunds as required by Order No. PSC-99-2369-PAA-WS, issued December 6, 1999.

DISCUSSION OF ISSUES

ISSUE 1: Should JJ's Mobile Homes, Inc., be ordered to show cause, in writing within 21 days, why it should not be fined up to \$5,000 per day for failure to make refunds as required by Order No. PSC-99-2369-PAA-WS, issued December 6, 1999?

RECOMMENDATION: The utility should be ordered to show cause, in writing, within 21 days, why it should not be fined \$400 per day from and including March 1, 2000, through May 4, 2000, for a total of \$26,000 for its apparent failure to make refunds as required by Order No. PSC-99-2369-PAA-WS. The show cause order should incorporate the conditions stated in the staff analysis. (JAEGER, IWENJIORA)

STAFF ANALYSIS: As stated above, by Order No. PSC-92-0777-FOF-WS, issued August 10, 1992, in Docket No. 920032-WS, the Commission had authorized JJ's to gross-up using the full gross-up formula. The authorized CIAC gross-up was subject to refund and, pursuant to Orders Nos. 16971 and 23541, could only be used to pay the actual tax liability incurred by the utility associated with its reception of CIAC.

By PAA Order No. PSC-99-2369-PAA-WS, the Commission determined that JJ's had over collected CIAC gross-up. In arriving at this final determination, the Commission allowed 50 percent of the acceptable legal and accounting fees which reduced the total amount to be refunded by approximately \$12,369. Having taken into account 50 percent of the acceptable legal and accounting fees, the Commission ordered JJ's to refund \$3,387 for 1992, \$1,559 for 1993, \$6,070 for 1994, and \$448 for 1995, for a total of \$11,464 plus accrued interest through the date of the refund, for gross-up collected in excess of the tax liability resulting from the collection of taxable CIAC.

In addition, the Commission ordered the utility to refund \$6,353 for 1994 and \$6,918 for 1995 for a total of \$13,271 plus accrued interest through the date of the refund, for the unauthorized collection of gross-up on meter fees. Order No. PSC-99-2369-PAA-WS required that all refunds be completed within two months of the effective date of that Order. Pursuant to the Consummating Order, the effective date was December 29, 1999, and so all refunds should have been completed on February 29, 2000. However, at the time of this recommendation, no refunds had been made.

DATE: MAY 4, 2000

Through a telephone conversation, the former President, director and shareholder of the utility, Jordan Hypes, advised staff counsel that the utility was dissolved almost two years ago. It appears that the utility was dissolved on September 29, 1998. Because of this dissolution, he argues that the utility no longer has any property or funds, and that he should not now be made to make the refunds. He further stated that he, personally, had no money to make such refunds, and, therefore, no refunds have been made.

Under certain conditions, the directors and shareholders of a dissolved corporation may be held responsible for an improper distribution of funds. Section 607.06401(3), Florida Statutes, 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

Section 607.0834(1), Florida Statutes, 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.

To hold a director liable under Section 607.0830, Florida Statutes, it must essentially be shown that the director made the unlawful distribution in bad faith. Furthermore, 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" Section 607.0834(3), Florida Statutes.

Further, Section 607.1406(13), Florida Statutes, provides that a shareholder of a dissolved corporation is not liable for any claim against the corporation which is brought after three years of the effective date of dissolution. Because this corporation was dissolved on September 29, 1998, a lawsuit against the directors must be brought prior to September 29, 2000, and one against the shareholders must be brought prior to September 29, 2001.

Based on the above, staff believes that the utility has not made the required refunds and has violated Order No. PSC-99-2369-

PAA-WS. Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes, or any rule or order of the Commission. In failing to make the required refunds, the utility's act was "willful" in the sense intended by Section 367.161, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Additionally, "[i]t is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Pursuant to Section 367.161(1), Florida Statutes, each day the utility violates Order No. PSC-99-2369-FOF-WS constitutes a separate offense, which could conceivably result in a penalty of up to \$5,000 per day since the date the utility began violating Order No. PSC-99-2369-FOF-WS. Staff recommends that JJ's should be ordered to show cause, in writing, within 21 days, why it should not be fined \$400 per day from March 1, 2000, through May 4, 2000 for its apparent violation of Order No. PSC-99-2369-1082-FOF-WS. Because the refunds should have been concluded on February 29, 2000 (two months after the Consummating Order was issued on December 29, 1999), the total number of days through May 4, 2000 is 65 (31 for March, 30 for April, and 4 in May). Therefore the fine will amount to \$26,000.

In calculating the amount to fine the utility, staff notes that the utility was required to refund a total of \$24,735 (\$11,464 for excess CIAC gross-up, plus \$13,271 for unauthorized collection of gross-up on meter fees), plus accrued interest. The utility has indicated that it does not plan to make that refund, and staff believes that the fine should be at least as great as the amount the utility refuses to refund.

Staff notes that, when a utility is sold or dissolved and refuses to make a refund, the Commission has had a difficult time forcing them to make refunds. See: Turkey Creek Utilities, Docket No. 921098-WS; Martin Downs Utilities, Inc., Docket No. 931065-WS; and Sunnyland Utilities, Inc., Docket No. 860149-WU. Of course,

DATE: MAY 4, 2000

many dissolved or sold utilities have made the refunds as required. See: San Pablo Utilities Corporation, Docket No. 901019-WS; Canal Utilities, Inc., Docket No. 941083-WS; Mid-Clay Service Corporation, Docket No. 940096-WS; and Clay Utility Company, Docket No. 940097-WS.

Staff believes that, unless the developer himself files a lawsuit, the utility may very well never have to make those refunds. When the Commission has filed suit in Circuit Court to seek enforcement of its orders requiring a refund, one of the problems is that the money is owed to the developers/customers and not to the Commission. By fining the utility \$26,000, the Commission or Comptroller can show that at least that money is owed to the State and have a better chance of collecting that amount. Therefore, if the refund is never made, and the Commission collects the fine, the utility will not have profited by refusing to obey a lawful order of this Commission.

Staff also recommends that the show cause order incorporate the following conditions: JJ's response to the show cause order must contain specific allegations of fact and law. Should JJ's file a timely written response that raises material questions of fact and makes a request for hearing pursuant to Section 120.57(1), Florida Statutes, further proceedings shall be scheduled before a final determination on this matter is made. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. In the event JJ's fails to file a timely response to the show cause order, the penalty is deemed assessed with no further action required by the Commission. In that event, if JJ's fails to respond to reasonable collection efforts by Commission staff, the collection of penalties should be referred to the Comptroller's office for further collection efforts. Reasonable collection efforts shall consist of two certified letters requesting payment. The referral to the Comptroller's office would be based on the conclusion that further collection efforts by this Commission would not be cost effective.

ISSUE 2: Should the docket be closed?

RECOMMENDATION: If JJ's responds to the show cause order by paying the fine, no further action will be required and this docket should be closed administratively. If JJ's fails to timely respond to the show cause order and fails to respond to Commission staff's reasonable collection efforts, then this matter should be referred to the Comptroller's office for further collection efforts and this docket should be closed administratively. If JJ's responds to the show cause order and requests a hearing, this docket should remain open for final disposition. (JAEGER, IWENJIORA)

STAFF ANALYSIS: If JJ's responds to the show cause order by paying the fine, no further action will be required and this docket should be closed administratively. If JJ's fails to timely respond to the show cause order and fails to respond to Commission staff's reasonable collection efforts, then this matter should be referred to the Comptroller's office for further collection efforts and this docket should be closed administratively. If JJ's responds to the show cause order and requests a hearing, this docket should remain open for final disposition.