



# Public Service Commission

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RECORDS AND REPORTING

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**DATE:** JULY 23, 1998

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

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

**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:** AUGUST 4, 1998 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** AUGUST 24, 1998 FOR FILING IN CIRCUIT COURT

**SPECIAL INSTRUCTIONS:** NONE

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

### CASE BACKGROUND

On October 26, 1990, Martin Downs Utilities, Inc. (Martin Downs or utility) 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 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.

Martin Downs's facilities were sold to Martin County on August 12, 1993. By administrative Order No. PSC-93-1484-FOF-WS, issued

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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.

The disposition of CIAC gross-up collections was not addressed in Docket No. 930818-WS. However, the Commission asserted jurisdiction to address the disposition of gross-up collections even though the facilities had been sold to the County. See Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995), and Order No. PSC-97-1147-FOF-WS.

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. 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).

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

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, 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.

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.

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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.

Staff has now determined that no refunds were made and that all funds were dispersed to the shareholders several years ago. The purpose of this recommendation is to address what actions are open to the Commission with this dissolution of the corporation.

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### 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:** Pursuant to Sections 120.69, 367.011 and 607.01406(9)-(15), Florida Statutes, the Commission should 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 Utilities, Inc. (IWENJIORA, C. ROMIG, JAEGER)

**STAFF ANALYSIS:** Martin Downs 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 August 12, 1993, Martin County purchased the water and wastewater facilities from Martin Downs.

As previously stated, Order No. PSC-93-1484-FOF-WS canceled Martin Downs'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, Martin Downs 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, Martin Downs's 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

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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.

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. 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 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, the disposition of those funds remains in the purview of the Commission.

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.

Assuming this continued jurisdiction, 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

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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, the Commission determined that Order No. PSC-93-1484-FOF-WS, issued on 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 Order No. PSC-97-1147-FOF-WS, the Commission interpreted the powers given to the Commission by Section 367.011, Florida Statutes. In that Order, the Commission determined that it was not necessary for the October 12 Order to specifically retain jurisdiction or advise Martin Downs that refunds of CIAC gross-up for the period from October 1, 1989, through the date of sale might be required.

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 Martin Downs 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.

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:

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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(3), Florida Statutes. Although staff does not know when the distribution was made, the sale was not consummated until August 12, 1993, and Docket No. 931065 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." However, the opening of Docket No. 931065-WS would not appear to be commencement of a proceeding pursuant to Chapter 607.0834, Florida Statutes. Therefore, it is doubtful whether the opening of this docket satisfied the requirement that a proceeding be commenced within 2 years of the effect of the distribution. However, staff believes that the Commission should seek to require the directors to make the refunds and let the court decide whether they are liable.

Further, 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 even as late as August 25, 1998.

Staff is 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 by the Circuit Court on March 16, 1992, and the docket



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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 was a distribution made to shareholders, and staff believes 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." The Commission may show cause and fine Martin Downs for its failure to make refunds with interest. However, even if the fines could be collected, there is no benefit to the customers if the utility fails to make the refunds.

Therefore, staff believes that the Commission should exercise its statutory grant of authority and, pursuant to Sections 120.69, 367.011 and 607.01406(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.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. (JAEGER)

**STAFF ANALYSIS:** If the Commission approves issue 1, this docket should remain open pending final resolution of action in circuit court.