

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Disposition of
contribution-in-aid-of-
construction gross-up funds
collected by South Seas Utility
Company in Lee County.

DOCKET NO. 980061-SU
ORDER NO. PSC-98-0315-FOF-SU
ISSUED: February 23, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION ORDER REQUIRING REFUNDS FOR THE
YEARS 1990 THROUGH 1994

AND

FINAL ORDER DECLINING TO INITIATE SHOW CAUSE PROCEEDING

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action concerning refunds discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code. However, that portion of the Order declining to initiate a show cause proceeding is final agency action.

BACKGROUND

South Seas Utility Co. (South Seas or utility) is a Class B wastewater utility providing service to the public in Lee County. As of December 31, 1996, the utility served 64 wastewater customers. The utility had gross operating revenues of \$459,237, and reported a net operating loss of \$11,803.

As a result of the repeal of Section 118(b) of the Internal Revenue Code, contributions-in-aid-of-construction (CIAC) became

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gross income and were depreciable for federal tax purposes. In Order No. 16971, issued December 18, 1986, we 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, required 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, we required any water and wastewater utility already collecting the gross-up on CIAC and wishing to continue, to file a petition for approval with the Commission on or before October 29, 1990. By letter dated September 30, 1991, the utility relinquished its authority to continue to gross-up. As a result, Order No. 25256, issued October 28, 1991, canceled South Seas authority to gross-up.

On September 9, 1992, we issued Proposed Agency Action (PAA) 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. An Amendatory PAA Order No. PSC-92-0961A-FOF-WS was issued September 14, 1992. On October 12, 1994, PAA Order No. PSC-94-1265-FOF-WS, revised the full gross-up method generic calculation form. No protests to any of these orders were filed, and the Orders became final.

On March 29, 1996, we opened Docket No. 960397-WS to review our 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. By PAA Order No. PSC-96-0686-FOF-WS, issued May 24, 1996, we directed our staff to review the proposals and comments offered by the workshop participants and make a recommendation concerning whether our policy regarding the collection and refund of CIAC should be changed. In addition, we directed our staff to consider ways to simplify the process and determine whether there were viable

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alternatives to the gross-up. Pending this review, we directed our staff to continue processing CIAC gross-up refund cases pursuant to Orders Nos. 16971 and 23541.

However, on August 1, 1996, The Small Business Job Protection Act of 1996 (The Act) passed congress and was signed into law 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, we issued Order No. PSC-96-1180-FOF-WS revoking the authority of utilities to collect gross-up of CIAC and canceling the respective tariffs unless, within 30 days of the issuance of the order, affected utilities requested a variance. Since, there was no longer a need to review our policy on the gross-up of CIAC, we issued Order No. PSC-96-1253-FOF-WS on October 8, 1996, closing 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.

By correspondence dated December 15, 1994, South Seas submitted its proposed refunds for 1989 through 1994. In that report, South Seas acknowledged that gross-up taxes were collected in error during 1992 through 1994.

This Order addresses whether a show cause proceeding should be initiated, and the amount of CIAC gross-up funds that should be refunded for the years 1989 through 1994.

SHOW CAUSE PROCEEDING

As stated above, despite cancellation of its authority by Order No. 25256, South Seas continued to collect CIAC gross-up from 1992 to 1994 (Order No. 25256, issued October 28, 1991, canceled its authority). According to the utility, the erroneous collection of CIAC gross-up without authority occurred during the period when the company was undergoing reorganization.

Upon being advised that it had no authority to collect the CIAC gross-up, the utility expeditiously responded by discontinuing the collection for new accounts and prepared a refund proposal for all collections during this period. Further, the utility has been

cooperative and has provided all information requested by our staff.

Although violation of Order No. 25256 and Section 367.091(3), Florida Statutes, could be said to be "willful" (see Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL), we do not believe that it would serve any purpose to initiate show cause proceedings. All violations seem to be due to a unintentional error that occurred during the reorganization of the utility's staff. Therefore, we believe there are mitigating circumstances which obviate the need for any show cause proceeding, and find that no show cause proceeding is warranted.

REFUND REQUIREMENT

South Seas filed its 1989 through 1994 proposed refund report and tax returns regarding its collection of gross-up for each year. Our calculations and the utility's calculations are in agreement on the refund amounts for the years listed.

No refund is necessary for 1989, because the utility did not collect CIAC gross-up in 1989. The utility did not incur a tax liability during 1990 through 1991, and its authority to gross-up was canceled in 1991. Therefore, all CIAC gross-up collected in 1990 and 1991 shall be refunded. Because the utility's authority to collect gross-up had been canceled in 1991, all collections from 1992 through 1994 shall be refunded.

Our refund calculations are based on the method adopted in Order No. PSC-92-0961-FOF-WS. Our calculations, taken from the information provided by the utility in its gross-up report and tax return are reflected on the schedule attached to this Order. A summary of each year's refund calculation follows.

1989

No gross-up taxes were collected in 1989; therefore, no refund is appropriate.

1990

The utility proposes a refund of \$4,720 for 1990 gross-up collections. We agree that a refund of the entire \$4,720 in gross-up collections for 1990 is appropriate.

Based upon our review of the utility's 1990 filing, the utility did not pay income taxes due to a net operating loss that resulted in no tax liability. Therefore, the entire amount of gross-up taxes collected shall be refunded. Based upon the foregoing, the utility shall refund \$4,720 in gross-up taxes. This amount does not include the accrued interest which also must be refunded from December 31, 1990 to the date of refund.

1991

The utility proposes a refund of \$1,888 for 1991 gross-up collections. We agree that a refund of \$1,888 in gross-up collections for 1991 is appropriate.

Based upon our review of the utility's 1991 filing, the utility incurred no tax liability for that year and paid no income taxes. The utility's authority to continue grossing up was canceled on October 28, 1991. Therefore, the entire \$1,888 in CIAC gross-up collected shall be refunded. This amount does not include the accrued interest which also must be refunded from December 31, 1991 to the date of refund.

1992

The utility proposes a refund of \$4,720 for 1992 gross-up collections. We agree that a refund of \$4,720 in gross-up collections for 1992 is appropriate.

The total gross-up collected in 1992 was \$4,720. According to the utility, the collections were an error, because their authority to collect the gross-up was canceled in 1991. Therefore, the entire gross-up collections of \$4,720 shall be refunded. This amount does not include the accrued interest which also must be refunded from December 31, 1992 to the date of refund.

1993

The utility proposes a refund of \$7,552 for 1993 gross-up collections. We agree that a refund of \$7,552 in gross-up collections for 1993 is appropriate.

The total gross-up collected in 1993 was \$7,552. Because the utility's authority to collect gross-up had been canceled in October 1991, the entire gross-up collections of \$7,552 shall be refunded. This amount does not include the accrued interest which also must be refunded from December 31, 1993 to the date of refund.

1994

The utility proposes a refund of \$940 for 1994 gross-up collections. We agree that a refund of \$940 in gross-up collections for 1994 is appropriate.

The total gross-up collected in 1994 was \$940. Because the utility's authority to collect gross-up had been canceled, the entire gross-up collections of \$940 shall be refunded. This amount does not include the accrued interest which also must be refunded from December 31, 1994 to the date of refund.

In accordance with Orders Nos. 16971 and 23541, all amounts shall be refunded on a pro rata basis to those persons who contributed the taxes. The refunds shall be completed within six months. The utility shall 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 refund. Within 30 days from the date of the refund, the utility also shall provide a list of unclaimed refunds detailing the contributor and amount, and an explanation of the efforts made to make the refunds.

CLOSING OF DOCKET

Upon expiration of the protest period for the refund portion of this Order, if a timely protest is not received from a substantially affected person, this docket shall remain open pending completion and verification of the refunds. Upon

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verification that the refunds have been made, the docket shall be closed administratively.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that no show cause proceeding shall be initiated against South Seas Utility Company for its violation of Order No. 25256. It is further

ORDERED that the refund portions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that no refund is required for the year 1989. It is further

ORDERED that the refunds for the years 1990 through 1994 shall be carried out as set forth in the body of this Order. It is further

ORDERED that South Seas Utility Company, shall refund accrued interest through the date of refund, for all gross-up of contributions-in-aid-of-construction it collected for these years. It is further

ORDERED that, pursuant to Orders Nos. 16971 and 23541, all refund amounts shall be refunded on a pro rata basis to those persons who contributed the funds. It is further

ORDERED that the refunds required herein shall be completed within six months of the effective date of this Order, and that South Seas Utility Company, shall submit copies of canceled checks, or other evidence verifying that the refunds have been made within 30 days of completion of the refund. It is further

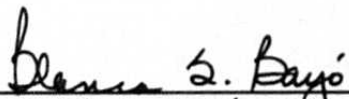
ORDERED that within 30 days of completion of the refund, South Seas Utility Company, shall provide a list of unclaimed refunds

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detailing the contributor and the amount, and an explanation of the efforts made to make the refunds. It is further

ORDERED that the docket shall be administratively closed upon expiration of the protest period, if no timely protest is filed, and upon our staff's verification that the refunds have been made.

By ORDER of the Florida Public Service Commission this 23rd day of February, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

As identified in the body of this Order, our action concerning refunds herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 16, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and

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Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.