

M E M O R A N D U M

April 11, 90

TO : DIVISION OF RECORDS AND REPORTING  
FROM : DIVISION OF LEGAL SERVICES (FRIER) *RF*  
RE : DOCKET NO. 891020-WS - COMPLAINTS OF VILANO VENTURE,  
INC. AGAINST NORTH BEACH UTILITIES, INC. IN ST. JOHNS  
COUNTY FOR FAILURE TO COMPLY WITH FLORIDA PUBLIC  
SERVICE COMMISSION RULES AND REGULATIONS.

DOCKET NO. 891120-WS - REQUEST BY NORTH BEACH  
UTILITIES, INC. FOR APPROVAL OF A SPECIAL SERVICE  
AVAILABILITY CONTRACT WITH VILANO VENTURE, INC. IN ST.  
JOHNS COUNTY.

*22796*

-----  
Attached is a Order Approving Settlement Agreement and  
Authorizing Gross-up of CIAC in the above-referenced docket,  
consisting of - 15 - pages.

JRF/lp  
cc: Division of Water and Sewer

DOCUMENT NUMBER-DATE  
03147 APR 11 1990  
FPC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaints of VILANO VENTURE, ) DOCKET NO. 891020-WS  
INC. against NORTH BEACH UTILITIES, )  
INC. in St. Johns County for failure )  
to comply with Florida Public Service )  
Commission rules and regulations. )  
\_\_\_\_\_ )

In re: Request by NORTH BEACH ) DOCKET NO. 891120-WS  
UTILITIES, INC. for approval of a )  
special service availability contract ) ORDER NO. 22796  
with VILANO VENTURE, INC. in St. Johns )  
County. ) ISSUED: 4-11-90  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

GERALD L. GUNTER  
JOHN T. HERNDON

ORDER APPROVING SETTLEMENT AGREEMENT  
AND AUTHORIZING GROSS-UP OF CIAC

BY THE COMMISSION:

CASE BACKGROUND

North Beach Utilities, Inc. (North Beach Utility) is a Class C water and wastewater utility providing service to approximately 400 customers in St. Johns County.

On October 21, 1986, the Utility entered into a developer agreement with Vilano Venture, Inc. (Vilano) for the provision of water and wastewater service to 294 of Vilano's housing units. The agreement provided, in part, that the developer would install all on-site lines and pay \$1000 per unit for the first 50 units (\$50,000) plus \$50,000 in lieu of furnishing property for a percolation pond. However, the terms of the agreement are not consistent with the Utility's approved service availability policy and charges. Therefore, on October 27, 1988, the Utility requested that we approve the agreement as a special developer agreement pursuant to Rule 25-30.550(2), Florida Administrative Code. Docket No. 891120-WS was established to process the request.

DOCUMENT NUMBER-DATE

03147 APR 11 1990

PSC-RECORDS/REPORTING

On July 24, 1989, Vilano filed two separate complaints against the Utility and Docket No. 891020-WS was established to process the complaints. The first complaint alleged that the Utility was providing unsatisfactory water service to Vilano's development in that the quality of the water was unacceptable. The second complaint questioned the propriety of the service availability charges contained in the October 26, 1986 developer agreement discussed above. By Order No. 22055, issued on October 13, 1989, Docket No. 891120-WS was consolidated with Docket No. 891020-WS and the consolidated matter was set for hearing on February 16, 1990.

On October 30, 1989, Order No. 22109 was issued establishing prehearing procedures in the consolidated case. On November 13, 1989, the parties filed a stipulated motion for revision of the filing schedule established in Order No. 22109. The stipulated motion was approved in Order No. 22212, issued November 21, 1989.

On January 16, 1990, counsel for the Complainant informed our staff that a firm settlement between the parties had been achieved and a formal stipulation agreement would be forthcoming. On January 26, 1990, Order No. 22474 was issued suspending the filing schedule. The parties were ordered to file an executed copy of their settlement agreement with this Commission on or before February 16, 1990, or to inform our staff in writing that the matter needed to proceed to hearing.

#### SETTLEMENT AGREEMENT

On February 16, 1990, the parties' filed their agreement of settlement with this Commission and requested that the pending hearing be cancelled. The main provisions of the parties agreement are set forth below.

First, the cash contributions paid by Vilano to the Utility to date reserve capacity for 300 units, not including tap-in fees or meter installation fees. Vilano has paid a total of \$179,200 in cash contributions to date. The Utility's approved system capacity charges are \$750 and \$450 for water and wastewater, respectively. Thus, \$179,200 represents 149.3 equivalent residential connections (ERCs) or 300 units at one-half ERC per unit.

Second, Vilano agrees to pay for and install all on-site

ORDER NO. 22796  
DOCKETS NOS. 891020-WS & 891120-WS  
PAGE 3

water and wastewater lines within its project. The on-site lines are already in for Phase I of the development and those lines were installed by Vilano. Additional lines will be required as Phase II is developed.

Third, the parties agree that for lines constructed or installed after December 15, 1989, the tax impact will be paid by Vilano per the Utility's authorized tariff. The Utility does not currently have authority to collect the gross-up on contributions-in-aid-of-construction (CIAC), but has filed proposed tariff sheets for this authority and such request will be addressed later in this Order.

Fourth, the Utility agrees to construct a reverse osmosis water treatment plant in an attempt to resolve the existing quality of service problems. The plant is scheduled to be on-line by March 31, 1991. The Utility further agrees that the reverse osmosis plant is not on-line and operational by March 31, 1991, Vilano Venture, Inc. will not be required to pay for the tax impact of donated lines as discussed above.

Other aspects of the agreement include terms and conditions for both parties if Vilano Venture, Inc. elects to connect less than the 300 units for which CIAC has been prepaid.

Based upon our review of the parties' settlement agreement, we find that although the agreement does not comply with the Utility's approved tariff, such agreement does reasonably resolve the dispute between the parties over the aforementioned special developer's agreement and the two pending complaints. The parties appear to have made good faith efforts to resolve complex problems which would otherwise have resulted in a costly hearing process. Accordingly, we hereby approve the agreement as being in the public interest. A copy of the parties' executed settlement agreement is attached hereto as Attachment A.

In addition to requesting our approval of the settlement agreement, the Utility filed a simultaneous request for authority to gross-up its CIAC collections.

#### GROSS-UP OF CIAC

On December 18, 1986, through Order No. 16971, we authorized corporate water and wastewater utilities to gross-up

ORDER NO. 22796  
DOCKETS NOS. 891020-WS & 891120-WS  
PAGE 4

CIAC in order to meet their potential tax liabilities resulting from the inclusion of CIAC in taxable income. Several subsequent Orders have clarified our requirements for utilities to receive authority to gross-up (Order Nos. 17058, 17396, and 18266). Further, in Proposed Agency Action Order No. 21266, issued May 22, 1989, we proposed to require that prior to our approving a utility's request to gross-up, certain criteria must be satisfied. Our Order No. 21266 was timely protested and is presently scheduled for an administrative hearing on April 27, 1990.

The Utility has filed a copy of its 1988 corporate tax return which shows that it did have a tax liability for that year as a result of CIAC collections. The Utility states that it is a small utility in a rapidly growing area. The Utility further states that it has received and will continue to receive substantial contributions of cash and property as its service area develops.

Upon due consideration of the above, we find that the Utility's request for authority to gross-up CIAC is reasonable and is therefore approved pursuant to the provisions of Orders Nos. 16971, 17058, 17396 and 18266. The gross-up shall be effective for collections of CIAC on or after the stamped approval date on the Utility's revised tariff sheets.

It is, therefore,

ORDERED by the Florida Public Service Commission that the settlement agreement between North Beach Utilities, Inc. and Vilano Ventures, Inc., attached hereto as Attachment A, and by reference incorporated herein, is hereby approved. It is further

ORDERED that North Beach Utilities, Inc. is hereby authorized to gross-up its CIAC collections pursuant to Orders Nos. 16971, 17058, 17396 and 18266. It is further

ORDERED that the gross-up shall be effective for collections of CIAC on or after the stamped approval date on the revised tariff sheets. It is further

ORDERED that Dockets Nos. 891020-WS and 891120-WS shall be closed.

ORDER NO. 22796  
DOCKETS NOS. 891020-WS & 891120 S  
PAGE 5

By ORDER of the Florida Public Service Commission  
this 11th day of APRIL, 1990.

  
STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

JRF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and 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 after the issuance 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.

AGREEMENT OF SETTLEMENT

THIS AGREEMENT is made and entered into this 2<sup>nd</sup> day of ~~February~~ <sup>March</sup>, 1990, by and between North Beach Utilities, Inc., a Florida corporation, hereinafter referred to as "North Beach," and Vilano Venture, Inc., a Florida corporation, hereinafter referred to as "Vilano."

WHEREAS, North Beach (sometimes hereinafter referred to as "the utility") and Vilano are parties to certain dockets currently pending before the Florida Public Service Commission, specifically Docket Nos. 891120-WS and 891020-WS; and

WHEREAS, the parties after negotiation and discussion on the premises of those dockets and the terms and conditions contained herein desire to resolve their differences which are the subject of the above-referenced dockets, and to effectuate the closing of those dockets; and

WHEREAS, in furtherance of the above, North Beach and Vilano have conferred to seek an amicable resolution in order to avoid further expenses of litigation and as a result of those negotiations North Beach and Vilano have entered into this agreement; and

WHEREAS, the parties have considered all of the relevant and applicable facts, law, and currently available data.

NOW, THEREFORE, and in consideration of the foregoing and the mutual covenants contained herein, it is agreed as follows:

R E C I T A T I O N S

1. The foregoing recitations are true and correct.
2. The Water and Sewer Agreement dated October 21, 1986, and the Addendum thereto dated October 21, 1986, (attached hereto as Composite Exhibit "A") as executed between North Beach and Vilano remain in full force and effect but are hereby expressly modified by the terms and conditions of this Agreement of Settlement to the extent, and only to the extent, that the terms and conditions of this Agreement of Settlement are inconsistent with the terms and conditions of the Water and Sewer Agreement.
3. The parties recognize, covenant and agree that Vilano has prepaid to North Beach treatment plant capacity charges, specifically service availability and connection fees, for water and sewer service for up to, and including, 300 units at the Villages of Vilano (hereinafter sometimes referred to as the "project"), and North Beach hereby acknowledges receipt of such prepayment from Vilano. Such plant capacity charges do not include tap-in fees or meter fees.
4. As further consideration for the promise of North Beach to reserve capacity for, and ultimately provide service to, Vilano's project as contemplated herein, Vilano covenants and agrees to pay for and properly install, or to cause to be paid for and properly installed, at its sole expense, any and all water and sewer lines and/or related facilities, which will be located in the project, and which would be necessary for North Beach to render water and sewer utility services to units in the project.



(a) For any water and sewer utility lines and/or related facilities constructed and/or installed prior to December 15, 1989, North Beach agrees to accept the donation of the same from Vilano as specified by the agreement in Exhibit "A", including all continuing maintenance obligations related to said facilities, and North Beach agrees to pay or otherwise to accept responsibility for the resulting income tax impact or liability of said donation, if any.

(b) For any and all such lines and/or facilities which are or have been constructed and/or installed by Vilano after December 15, 1989, North Beach agrees to accept the donation of the same, including all continuing maintenance obligations related to said facilities, upon the condition that the tax impact or liability, if any, of said donation shall be covered or paid per North Beach's duly authorized tariff applicable on the date that said donation is properly tendered by Vilano as specified by the agreement in Exhibit "A".

5. Vilano may elect, in its sole discretion, to connect to the utility some number of units which will or may ultimately total less than 300. Should Vilano notify North Beach in writing of its good faith present intention not to construct, and therefore not to connect a given number of units to the utility (that number to be definitively indicated in the written notice(s)), then Vilano will receive a "credit" (as hereinafter defined) of \$597 per unit, for each unit which Vilano has communicated its intention not to connect, to be paid by North Beach to Vilano as hereinafter

specified.

6. Should Vilano be entitled to receive any such credits, as contemplated by paragraph 5, the same shall be paid by North Beach to Vilano as follows: Commencing on the date on which North Beach receives from Vilano any written notice contemplated by paragraph 5, North Beach shall convey to Vilano \$597 per waived connection within a reasonable time after any such single connection or group of connections to North Beach's utility system is effectuated by any other person or entity who pays to North Beach the then applicable tariff rate for plant capacity charges, whether paid in money or property for such connection, until such time as all credits due and owing to Vilano from North Beach for unused connections, as contemplated herein, are satisfied.

7. Should Vilano still be entitled to receive, pursuant to the terms of this Agreement, a credit or credits for unused connections as contemplated herein after the lapse of 5 calendar years from the date of any written notice by Vilano as contemplated herein, North Beach shall, within 30 days after the date on which any such 5 calendar year period lapses, pay to Vilano a lump sum equal to the total credit then owed by North Beach to Vilano pursuant to the terms of this Agreement.

8. The parties recognize, covenant and agree that for any unit or units for which Vilano has given its notice to North Beach pursuant to paragraph 5 herein (that Vilano does not intend to connect the same) the ultimate individual service and connection of said units, if any, will be pursuant to the terms and conditions

of North Beach's duly authorized tariff in effect and applicable on the date such units, or any such residential units or commercial units constructed in the place of those units currently contemplated, are connected to the utility system. Vilano agrees that neither Vilano nor any successor or assign of Vilano shall have any right or privilege to service from North Beach for such units as referenced above at any rate or charge other than those contemplated by North Beach's duly authorized tariff in effect at such time except and unless as specifically set forth herein.

9. As referenced herein, Vilano has prepaid North Beach for 300 water and sewer connections for use exclusively within the Villages of Vilano. Should Vilano return or otherwise release any of those units for credits as specifically contemplated herein, Vilano may retrieve or otherwise reactivate its right to have those units connected at the applicable price specified within North Beach's duly authorized tariff in effect at the time of said payment by notifying North Beach, in writing, of its intent to do so. However, as to any units which have been retrieved or reactivated by Vilano pursuant to the terms of this Agreement and for which Vilano has been reimbursed or otherwise paid by North Beach as contemplated herein, said units shall only be served by North Beach at the applicable tariff rate dependent upon the existence of available treatment plant and line capacity to provide service to such units.

10. In furtherance of the parties' desire to amicably settle the matters at issue in the Florida Public Service Commission

dockets referenced above, North Beach further covenants and agrees to construct and install a reverse osmosis water treatment facility designed to treat drinking water provided to North Beach's customers including, but not limited to, the Villages of Vilano. North Beach shall use its best efforts such that the reverse osmosis facility will be on-line and operational by March 31, 1991. Should the reverse osmosis facility not be on-line and operational by said date, the parties agree that no cash payments for the tax impact, even if allowed for under the authorized tariff and pursuant to the terms of paragraph 4(b) hereof, shall be due and owing to North Beach from Vilano.

11. In the event of force majeure wholly outside the reasonable control of a party which shall prevent that party from complying with the terms of this Agreement, then said party shall be excused from complying with said provision of this Agreement for so long as the said force majeure shall prevent performance. A force majeure shall include, but not be limited to, orders or actions of courts or regulatory agencies having jurisdiction, riot, civil insurrection, war, atomic explosions, destruction of property by vandals, failure of suppliers to deliver materials, or acts of God such as hurricane or earthquake. Notwithstanding the foregoing, if any cause for delay or nonperformance could have been going, if any cause for delay or nonperformance could have been avoided by the good faith, best efforts performance of the party concerned, then the previous provisions of this paragraph shall not apply.

12. This Agreement shall be governed by the laws of the State of Florida and it shall be and become effective immediately upon execution by both parties hereto, subject to any approvals which must be obtained from governmental authority.

13. It is the intention of the parties to submit this Agreement to the Florida Public Service Commission for its approval. The parties hereby covenant and agree that should the final order, judgment, or decision on the same, in whatever form, of the Florida Public Service Commission purport to alter, amend, or modify the terms and conditions of this Agreement, the parties hereto shall have an unrestricted right, in their sole discretion, to rescind this Agreement and to withdraw their consent hereto, and upon the agreement of each of the parties to renegotiate the terms and conditions of this Agreement, said right of rescission or withdrawal to be exercised and noticed in writing within 21 days of the date of filing of said order, judgment, or decision. No additions, alterations or variations of the terms of this Agreement shall be valid, nor can provisions of this Agreement be waived by either party, unless such additions, alterations, variations or waiver are expressed in writing and duly signed by the parties.

14. The parties hereto recognize that prior to the time that North Beach can actually commence upon a program to construct and install the reverse osmosis plant, North Beach may be required to obtain certain permits and approvals from various state and local governmental authorities having jurisdictional and regulatory power over the construction and installation of such plant. North Beach

agrees that it will diligently and earnestly make the necessary proper applications and/or filings to all governmental authorities and that it will use its best efforts to obtain the necessary permits and approvals in a proper and timely manner as contemplated herein. Vilano agrees to neither directly or indirectly oppose any such applications and/or filings. Vilano further agrees to provide reasonable assistance to North Beach in obtaining the permits and approvals contemplated herein. The failure of Vilano to provide assistance as contemplated herein shall not relieve or release North Beach from performance of any of the terms and conditions of this Agreement.

15. Vilano further agrees to provide reasonable assistance to North Beach in any proceeding filed by North Beach to increase its rates and charges to its customers, resulting from the construction and installation of the reverse osmosis plant referred to in paragraph 10 herein. The failure of Vilano to provide assistance as contemplated herein shall not relieve or release North Beach from performance of any of the terms and conditions of this Agreement.

16. North Beach agrees that it shall not seek any governmental action or determination for the direct purpose of affecting in any way a change in the effect of this Agreement as between the parties hereto, their successors or assigns.

17. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns.

18. Time is of the essence as to the performance of the terms and conditions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their duly authorized representatives as of the date and year first written above.

WITNESSES:

Neil L. Spivack  
Mary A. Blankenship  
Frank Henson  
Sharon Poyner

NORTH BEACH UTILITIES, INC.

By: [Signature]  
VILANO VENTURE, INC.

By: [Signature]

STATE OF Florida )  
COUNTY OF St. Johns ) SS

Before me, a notary public in and for said state and county, personally came FRANK D. USIA, as PRESIDENT of North Beach Utilities, Inc., to me well known and known to be the person named in the foregoing Agreement of Settlement and acknowledged that he/she executed the same for the purposes therein expressed.

WITNESS my hand and official seal this 2<sup>nd</sup> day of March, 1990.

Mary C. Blankenship  
Notary Public  
My Commission Expires:  
NOTARY PUBLIC, STATE OF FLORIDA  
My Commission Expires June 17, 1991

STATE OF FLORIDA )  
COUNTY OF DUVAL ) SS

Before me, a notary public in and for said state and county, personally came RONALD AL SCHMITZ, as PRESIDENT of Vilano Venture, Inc., to me well known and known to be the person named in the foregoing Agreement of Settlement and acknowledged that he/she executed the same for the purposes therein expressed.

WITNESS my hand and official seal this 22<sup>nd</sup> day of February, 1990.

Frank J. Davis  
Notary Public  
My Commission Expires:  
Notary Public, State of Florida  
My Commission Expires May 25, 1995