



# Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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RECORDS AND REPORTING  
PSC

**DATE:** SEPTEMBER 3, 1999

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

**FROM:** DIVISION OF LEGAL SERVICES (BRUBAKER, CIBULA) *RSB SMC RB*  
DIVISION OF WATER AND WASTEWATER (MESSER, REDEMANN) *RPR BSM*

**RE:** DOCKET NO. 981781-SU - APPLICATION FOR AMENDMENT OF CERTIFICATE NO. 247-S TO EXTEND SERVICE AREA BY THE TRANSFER OF BUCCANEER ESTATES IN LEE COUNTY TO NORTH FORT MYERS UTILITY, INC. *Am*

**AGENDA:** 09/07/99 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUE 1 - DECISION ON STIPULATION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\981781B.RCM

CASE BACKGROUND

North Fort Myers Utility, Inc. (NFMU or utility) is a Class A utility located in Lee County which provides only wastewater service. According to the 1997 annual report, the utility has 5,753 wastewater customers and reported operating revenues of \$1,958,553 and a net loss of \$598,220.

On or about August 24, 1998, NFMU executed a Developer Agreement with the owners of Buccaneer Mobile Estates, MHC-DeAnza Financial Limited Partnership (Park Owner) and Buccaneer Utility (Buccaneer). This Developer Agreement was filed with the Commission on September 4, 1998, and deemed approved on October 4, 1998 pursuant to Rule 25-30.550, Florida Administrative Code.

Buccaneer consists of 971 manufactured home sites which had previously received wastewater service from the Park Owner as part

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of the lot rental amount. Pursuant to a letter dated May 14, 1976 from the Florida Public Service Commission, the provision of service in this manner rendered the wastewater utility system exempt from regulation pursuant to Section 367.022(5), Florida Statutes.

Water service to Buccaneer is provided by Buccaneer Water Service, a Commission-regulated utility. The water utility purchases its water from Lee County Utilities, and therefore, does not have a water treatment plant. All tenants are charged metered rates for water, pursuant to Order No. PSC-96-1466-FOF-WU, issued December 3, 1996, in Docket No. 960133-WU.

On November 23, 1998, Buccaneer's existing wastewater permit expired. NFMU connected to Buccaneer on November 24, 1998. On December 1, 1998, NFMU filed an Application for Amendment to Certificate of Authorization to include the wastewater service area of Buccaneer. On December 7, 1998, NFMU filed an Emergency Motion to Implement Rates and Charges with respect to the interconnection of existing wastewater customers within the Buccaneer Estates mobile home community to NFMU. On December 9, 1998, NFMU responded to a staff request for additional information on the connection of Buccaneer, with a letter referencing various parts of Chapter 723, Florida Statutes.

On December 10, 1998, NFMU mailed the notice to the Buccaneer customers which stated that utility service had been assigned to NFMU, that connection fees would be collected, and that effective December 1, 1998, the utility would begin billing for monthly service and the lot rent would decrease by a specific amount.

On December 18, 1998, numerous customer protests concerning the application of NFMU's monthly rates and connection fees were received by the Commission. Among the protesting customers were Mr. Donald Gill, Mr. Joseph Devine and Mr. Ronald Ludington, whose letters were filed with the Commission on December 18, 1998, December 21, 1998, and December 21, 1998, respectively. On January 14, 1999, certain letters from the Buccaneer Mobile Home Park were filed with the Division of Records and Reporting which requested that OPC represent the Buccaneer residents in this matter. However, Commission records indicate that neither Messrs. Gill, Devine nor Ludington agreed to be represented by OPC or other counsel, nor have they filed requests to be considered qualified representatives pursuant to Rule 28-106.106, Florida Administrative Code. Therefore, these three individuals should be considered pro se litigants.

On December 21, 1998, the Office of Public Counsel (OPC) filed a Response to the Emergency Motion to Implement Rates and Charges. On January 14, 1999, OPC filed a Notice of Intervention pursuant to Section 350.0611, Florida Statutes, which was acknowledged by Order No. PSC-99-0180-PCO-SU, issued January 29, 1999. By Order No. PSC-99-0420-PCO-SU, issued March 1, 1999, the matter was set for an administrative hearing on September 14 and 15, 1999.

At the February 16, 1999 agenda conference, the Commission considered staff's recommendation addressing whether a show cause proceeding should be initiated with respect to the utility's interconnection of Buccaneer without prior Commission approval, and the request to collect rates and charges by NFMU from Buccaneer customers, pending the outcome of the hearing. Counsel for NFMU and OPC addressed the Commission regarding their respective positions. The Commission issued Order No. PSC-99-0492-SC-SU, on March 9, 1999, which ordered NFMU to show cause, in writing, within 21 days, why it should not be fined \$5,000 for an apparent violation of Section 367.045(2), Florida Statutes, for the failure to obtain approval of the Commission prior to serving territory outside of its certificate. The Order also denied NFMU's Emergency Motion to Implement Rates and Charges, stating that (1) the Commission has the jurisdiction to entertain the utility's motion; (2) it was inappropriate to approve a connection fee at that time; and (3) the Commission would not set monthly service rates until a determination is made as to whether the transfer is in the public interest.

On March 10, 1999, NFMU filed a Motion for Reconsideration of Order No. PSC-99-0492-SC-SU. A Request for Oral Argument was filed by NFMU on March 17, 1999. On March 22, 1999, OPC filed a response to NFMU's Motion for Reconsideration. On that same date, an Objection to NFMU's Motion for Reconsideration was filed by Mr. Donald Gill, a resident of Buccaneer Estates who had also filed a letter with the Commission on December 18, 1999, objecting to NFMU's amendment application. On April 14, 1999, NFMU filed a Notice of Additional Authority, in support of its Motion for Reconsideration. On July 27, 1999, the Commission issued Order No. PSC-99-1463-FOF-SU denying the utility's motion for reconsideration and notice of additional authority.

On August 27, 1999, the utility filed a Motion to Strike Parties. By its motion, the utility asserted that Messrs. Gill, Devine and Ludington should be stricken as parties because OPC and the utility have entered into a Settlement Agreement which resolves all issues of the case; Messrs. Gill, Ludington, and Devine failed to file any prehearing testimony or exhibits and a prehearing

statement as required by Order Establishing Procedure No. PSC-99-0420-PCO-SU; that the hearing will only consist of evidence which supports the Settlement Agreement, thus requiring a hearing will be "futile, time consuming and expensive"; and that Messrs. Gill, Ludington and Devine have "done nothing to represent themselves in this proceeding" and as a consequence must accept the settlement that OPC has negotiated.

A prehearing conference was held on August 30, 1999. At the prehearing conference, Messrs. Devine, Gill and Ludington made separate oral motions for an extension of time for the prehearing and hearing. The prehearing officer denied all three motions, finding that adequate notice of the procedures and prehearing and hearing dates were given and that there would be no benefit to delaying the prehearing and hearing.

Also at the prehearing conference, the utility's Motion to Strike Parties, filed on August 30, 1999, was addressed. The prehearing officer denied the motion to strike Messrs. Gill, Devine and Ludington as parties; however, the prehearing officer found that Messrs. Gill, Devine and Ludington may not offer witnesses or exhibits at the hearing and that their participation at the hearing would be limited to a concise statement of their objection and to cross-examining witnesses presented by the other parties because they failed to prefile testimony and prehearing statements as required by Order No. PSC-99-0420-PCO-SU.

OPC and the utility stated during the prehearing conference that an executed Settlement Agreement would be filed on August 31, 1999. Based on this information, the prehearing conference was continued until September 8, 1999, to allow staff to file a recommendation on the stipulation.

On August 31, 1999, OPC and the utility filed the executed Settlement Agreement. Messrs. Gill, Devine and Ludington are opposed to the settlement agreement and have refused to sign it. This recommendation addresses whether the Commission should approve the stipulation entered into by the utility and OPC.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Settlement Agreement filed with the Commission on August 31, 1999, be approved?

**RECOMMENDATION:** Yes, the Settlement Agreement filed with the Commission on August 31, 1999 should be approved, as modified by striking Paragraph 2 of the stipulation, and by changing the date that North Fort Myers Utility, Inc. may begin charging the Buccaneer customers, as contained in Paragraph 5 of the stipulation. Should the Commission approve the stipulation, the Order should issue as proposed agency action, since three parties oppose it. If the PAA Order is protested, the prehearing and hearing for the protest of the settlement agreement should be continued, since the prehearing and hearing are currently scheduled to be held prior to the time in which the PAA protest period would run. North Fort Myers Utility, Inc., should be allowed to collect monthly wastewater service rates from all customers of Buccaneer Estates, subject to refund with interest upon staff's approval of the security for the potential refund and a copy of the proposed customer notice, pending the final disposition of this case. (MESSER, REDEMANN, BRUBAKER, CIBULA)

**STAFF ANALYSIS:** As previously stated, on August 31, 1999, the utility and OPC filed a Settlement Agreement. The Settlement Agreement, which is appended to this recommendation as Attachment A, provides for the following:

1. The foregoing recitations are true and correct and incorporated herein by this reference.
2. OPC, Ludington, Gill and Devine shall voluntarily dismiss their objections to NFMU's Application, and shall support the granting of the Application.
3. Commencing with service rendered on and after September 1, 1999, NFMU will bill each resident of Buccaneer Estates based upon NFMU's approved Residential Service rate schedule, i.e., a base facility charge (currently \$10.98 per month) plus a charge per thousand of gallons of water registered on the meter (currently \$3.98 per 1,000 gallons). The parties acknowledge that NFMU obtains water meter reading information from Buccaneer Water Company.

4. NFMU waives any right to collect its service availability charges from the residents of Buccaneer Estates. NFMU warrants that it alone owns all of Snowbirdland Vistas, Inc. and MHC-DeAnza Financing Limited Partnership's (collectively, "Park Owner") right, title and interest to any pass-through charges that could ever be collected from the residents of Buccaneer Estates, under Chapter 723, Florida Statutes, concerning Buccaneer Estates' interconnection with NFMU wastewater collection and treatment system. As the sole owner of this right to collect any pass-through charges collectible from the residents, pursuant to this change of wastewater provider, NFMU does hereby waive the collection of any such pass-through charges from the residents. NFMU also expressly cancels, as if paid, any pass-through charges that could be collected from the residents, pursuant to this interconnection, forever holding the residents harmless from the payment of any pass-through charges, potentially collectible under Chapter 723, Florida Statutes, relating to Buccaneer Estates' interconnection with NFMU's system.
5. The residents shall not pay for wastewater service through August 31, 1999.
6. This agreement does not affect the rights of the residents of Buccaneer Estates to pursue their contract rights against the Park Owner under Chapter 723, Florida Statutes.
7. The parties agree that this Settlement Agreement is entered into to resolve a unique situation and shall not be relied upon as precedence in any future proceeding.
8. The parties agree to recommend that the Order to Show Cause proceeding against NFMU should be dismissed without penalty to NFMU.
9. The signatories warrant and represent that they have the authority to execute this Agreement and to bind their respective parties.
10. This Settlement Agreement shall be submitted to the Commission panel at the September 7, 1999 agenda.

Staff believes that the August 31, 1999 stipulation, as modified herein, fairly resolves the issues remaining in this

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docket as between OPC and the utility. Staff also notes that negotiated settlements are highly favored under the law. Furthermore, NFMU, OPC, and the directors of the Buccaneer Homeowner's Association all enthusiastically support the compromise represented by the stipulation.

As previously noted, Mr. Donald Gill, Mr. Joseph Devine and Mr. Ronald Ludington protested the utility's transfer application and are parties to this proceeding. They have not agreed to be represented by OPC, and have stated that they are opposed to the Settlement Agreement entered into by the utility and OPC and refuse to sign it. The utility's Motion to Strike their protests was denied at the prehearing. Therefore, Paragraph 2 of the settlement agreement, which would require these parties to voluntarily dismiss their objections, should be stricken.

Because Messrs. Gill, Devine and Ludington are parties to this proceeding and have not signed off on the stipulation, staff believes that if the Commission approves the stipulation, they must be given a point of entry to protest the stipulation. In addition, staff is recommending that the stipulation be approved except as modified with respect to Issues 2 and 5, discussed herein. Thus, staff recommends that any order approving the stipulation agreement be issued as proposed agency action (PAA). If the PAA Order is protested, the prehearing and hearing for the protest of the settlement agreement should be continued, since the prehearing and hearing are currently scheduled to be held prior to the time in which the PAA protest period would run.

Staff recommends that the parties should be put on notice that if the PAA order is protested, they are expected to participate fully in the proceeding, and should comply with all requirements and deadlines set forth in the applicable statutes, rules, and Commission orders.

Paragraph 5 of the settlement agreement would allow the utility to begin billing the Buccaneer residents for service beginning on September 1, 1999. Staff believes that the utility should be allowed to collect rates subject to refund pending the final disposition of this case. The reasons for this are that the utility and OPC, who represent the Buccaneer Homeowners' Association, have stipulated to begin billing the Buccaneer residents, the utility has been providing service to Buccaneer Estates since November 23, 1999, and there are no other utilities in close proximity able to provide service to Buccaneer Estates.

However, staff believes that the utility should not be allowed to begin charging the Buccaneer residents until staff has approved the security for any potential refund and the customers receive notice. The security should be in the form of a corporate undertaking, bond or letter of credit. Alternatively, the utility may establish an escrow agreement with an independent financial institution.

If the utility chooses a bond as security, the bond should contain wording to the effect that it will be terminated only under the following conditions:

- 1) The Commission approves the rate increase; or
- 2) If the Commission denies the increase, the utility shall refund the amount collected that is attributable to the rates.

If the utility chooses a letter of credit as security, it should contain the following conditions:

- 1) The letter of credit is irrevocable for the period it is in effect.
- 2) The letter of credit will be in effect until a final Commission order is rendered, either approving or denying the rates.

If security is provided through an escrow agreement, the following conditions shall be part of the agreement:

- 1) No refunds in the escrow account may be withdrawn by the utility without the express approval of the Commission.
- 2) The escrow account shall be an interest bearing account.
- 3) If a refund to the customers is required, all interest earned by the escrow account shall be distributed to the customers.
- 4) If a refund to the customers is not required, the interest earned by the escrow account shall revert to the utility.
- 5) All information on the escrow account shall be available from the holder of the escrow account to a Commission representative at all times.

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- 6) The amount of revenue subject to refund shall be deposited in the escrow account within seven days of receipt.
- 7) This escrow account is established by the direction of the Florida Public Service Commission for the purpose(s) set forth in its order requiring such account. Pursuant to Cosentino v. Elson, 263 So. 2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.
- 8) The Director of Records and Reporting must be a signatory to the escrow agreement.

In no instance should the maintenance and administrative costs associated with any refund be borne by the customers. These costs are the responsibility of, and should be borne by, the utility. In addition, after the rates are in effect, the utility should file reports with the Division of Water and Water no later than 20 days after each monthly billing. These reports should indicate the amount of revenue collected under the rates.

Staff's recommendation to allow the collection of rates subject to refund is consistent with the previous Commission decision in Order No. PSC-95-0624-FOF-WU, issued May 22, 1995, in Docket No. 930892-WU, In Re: Application for Amendment of Certificate No. 488-W in Marion County by Venture Associates Utilities Corp. This docket involved the approval of an amendment application, by final action, and the approval of rates and charges, issued as proposed agency action. The rates and charges were protested and the utility requested that it be allowed to collect interim rates. The Commission found that the utility was not entitled to interim rates as set forth in Section 367.082, Florida Statutes, but instead allowed the utility to collect temporary rates. The Commission likened the case to that of a staff-assisted rate case where the utility is authorized to collect temporary rates in the event of a protest and stated:

We recognized in these cases that a protest might delay what may be a justified rate increase resulting in an unrecoverable loss of revenue to the utility. We find that the same logic can be used here. Although Section 367.045, Florida Statutes, does not specifically provide such a vehicle, we find that we have the implicit authority to approve such a request in Section 367.011(3), Florida Statutes.

The Commission went on to state:

From a practical standpoint, at the outcome of this proceeding, we may find that the utility is rightfully entitled to collect the same rates and charges. To refuse Venture's request to collect the rates now, subject to refund, could result in an unrecoverable loss of revenues to the utility. Since the utility is, in fact, proposing to collect the revenue subject to refund, the utility is protected, as well as the customers, if there were to be a refund.

Based on all the above, and having reviewed the terms of the stipulation, staff recommends that the stipulation should be approved as modified herein. Staff also recommends that, pursuant to the agreement between OPC, the utility and the Buccaneer Homeowners' Association, NFMU should be allowed to collect monthly wastewater service rates for all customers of Buccaneer Estates, subject to refund with interest upon staff's approval of the security for the potential refund and a copy of the proposed customer notice. The security should be in the form of a corporate undertaking, bond or letter of credit. Alternatively, the utility should be allowed to establish an escrow agreement with an independent financial institution.

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**ISSUE 2:** If the Commission does not approve staff's recommendation in Issue 1, what is the appropriate procedure to be followed in this case?

**RECOMMENDATION:** If the Commission does not approve staff's recommendation in Issue 1, the appropriate procedure is to continue the prehearing and hearing to a date after which the period for reconsideration and appeal of any Order denying the Settlement Agreement has expired. However, if the parties are willing to represent at the September 7, 1999, Agenda Conference that they will not pursue reconsideration or appeal of any Order denying the Settlement Offer, then the appropriate procedure would be to continue the prehearing on Wednesday, September 8, 1999, as currently scheduled, in order to determine the issues of the hearing, and proceed to the September 14-15, 1999 hearing. (BRUBAKER, CIBULA)

**STAFF ANALYSIS:** If the Commission does not approve the Settlement Agreement entered into by the utility and OPC, the Order denying the stipulation will issue as a non-final order, not as a PAA. Therefore, the parties will be afforded an opportunity to either request reconsideration or appeal of the Order. This procedure is consistent with action taken by the Commission in Order No. PSC-95-1521-FOF-WS, issued December 7, 1995, in Docket No. 940761-WS, in which the Commission rejected a proposed offer of settlement. Therefore, if the Commission does not approve the stipulation, the appropriate procedure is to continue the prehearing and hearing to a date after which the period for reconsideration and appeal of any Order denying the Settlement Agreement has expired. However, if the parties are willing to represent at the September 7, 1999, Agenda Conference that they will not pursue reconsideration or appeal of any Order denying the Settlement Offer, then the appropriate procedure would be to continue the prehearing on Wednesday, September 8, 1999, as currently scheduled, in order to determine the issues of the hearing, and proceed to the September 14-15, 1999 hearing.

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**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No, this docket should remain open for final disposition of the case. (BRUBAKER)

**STAFF ANALYSIS:** As discussed in issues 1 and 2, regardless of the action taken by the Commission on this recommendation, this docket should remain open pending final disposition of the case.