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November 12, 1999

VIA HAND DELIVERY

ROBERT M. C. ROSE
OF COUNSEL

Ms. Blanco Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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RECORDS AND REPORTING

Re: North Fort Myers Utility, Inc.; Docket No. 981781-SU
Transfer of Buccaneer Estates to NFMU
Our File No. 16319.29

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and fifteen copies of North Fort Myers Utility, Inc.'s Post Hearing Statement of Issues and Positions. Also enclosed is a disk in Corel WordPerfect 8 containing this document.

Should you have any questions regarding this matter, please do not hesitate to call.

Very truly yours,

Martin S. Friedman
MARTIN S. FRIEDMAN
For the Firm

- AFA _____
- APP _____
- CAF _____
- CMU _____ MSF:brm
- CTR _____ Enclosure
- EAG _____ cc: Mr. Jack Schenkman (w/o encl.)
- LEG _____ 2 Dr. Michael Schenkman (w/o encl.)
- MAS _____ 3 Dr. Joel Schenkman (w/o encl.)
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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

IN RE: Application for)
amendment of Certificate No.)
247-S to extend service area by)
the transfer of Buccaneer Estates) Docket No. 981781-SU
in Lee County to)
NORTH FORT MYERS UTILITY, INC.)
_____)

NORTH FORT MYERS UTILITY, INC.'S
POST-HEARING STATEMENT OF ISSUES AND POSITIONS

MARTIN S. FRIEDMAN, ESQUIRE
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DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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INTRODUCTION

NORTH FORT MYERS UTILITY, INC., ("NFMU") by and through its undersigned attorneys files this Post Hearing Statement of Issues and Positions pursuant to Commission Order No. PSC-99-1786-PHO-SU ("Prehearing Order") and PSC-99-2154-PCO-SU. On October 13, 1999, a Final Hearing was held in accordance with the Prehearing Order in Fort Myers, Florida. Other than the public comment testimony, the only witness to testify was A.A. Reeves, III, on behalf of NFMU. The following three Exhibits were admitted into evidence:

Exhibit 1 by Staff - Documents of which the Commission takes
official notice.

Exhibit 2 by NFMU - Application and amendments

Exhibit 3 by NFMU - OPC/NFMU Settlement Agreement

Ludington Proposed Settlement Agreement

At the hearing, Intervenor Ronald Ludington sought to propose a settlement agreement substantially different from the one agreed to by the Office of Public Counsel ("OPC"), the Homeowners' Association, and NFMU. The approval of the OPC/NFMU Settlement Agreement was properly identified as an issue in the Prehearing Order. Ludington's proposed settlement agreement was not so

identified and is not properly before this Commission for consideration.

In addition to not being properly before the Commission, Ludington's proposed settlement agreement must fail for many other reasons. First, it affects the substantive rights of the owner of Buccaneer Estates who is not a party to this proceeding. It would be a violation of the park owner's right to due process to adjudicate its rights in this proceeding without its participation.

Further, the Ludington proposed settlement agreement would require this Commission to adjudicate issues under Chapter 723, Florida Statutes, which are not within its jurisdiction. Section 723.037(1), Florida Statutes, allows a mobile home park owner to cease providing utilities to residents of the park. The notice given by the owner of Buccaneer Estates was effective in accordance with Section 723.037(1), Florida Statutes, in spite of action or non-action by a third party. See, *Hobe Associates, Ltd. v. State Department of Business Regulation, Division of Florida Land Sales, Condominiums & Mobile Homes*, 504 So.2d 1301 (Fla. 1st DCA 1987) in which the court held the park owner's notice was effective even though a third party, the Bureau of Mobile Homes, had forbidden the park owner from sending the notice, and *Mihevic Corporation v. Horizon Village, Inc.*, 734 So.2d 1090 (Fla. 2d DCA 1999) in which

the court held the park owner's notice was effective even though a third party utility had erroneously begun collecting the utility rate prior to the expiration of the 90 day notice period.

The issues which arise in cases such as this are two fold, both of which are issues over which the circuit court has exclusive jurisdiction and not this Commission. The first is whether the reduction in the lot rental amount accurately represented the park owner's cost of providing sewer service in past years. The second is whether the interconnection was governmentally mandated which would allow the park owner to pass through the connection fees to the residents pursuant to Section 723.003(10), Florida Statutes. The Homeowners' Association's attorney testified that these two issues were among those which he will be litigating on behalf of the residents of Buccaneer Estates in the circuit court (Tr. 83).¹ In fact, the court has held that the amount by which a park owner unilaterally reduces lot rent when service is turned over to a PSC regulated utility is not within the Commission's jurisdiction. *Sandpiper Homeowners Association, Inc. v. Lake Yale Corp.*, 667 So.2d 921 (Fla. 5th DCA 1996).

¹References are to the electronic version of the transcript. References to Mr. Reeves prefiled testimony which is not included at the electronic version will be referenced as PFT followed by the appropriate page number of Mr. Reeves prefiled testimony.

Ludington's proposed settlement agreement must also fail because it provides that NFMU will waive the collection of the pass through of the service availability charges which were assigned to it by the park owner. While NFMU may voluntarily agree to waive the collection of the pass through charges, as it has done in the OPC/NFMU Settlement Agreement, it may not be compelled to do so by this Commission since those charges are collected pursuant to Chapter 723, Florida Statutes. This Commission has previously recognized that the pass through of an impact fee for connecting to a central wastewater system is not subject to this Commission's jurisdiction. *In re Request for exemption by Royal Manor Estates Community Water*, 94 FPSC 12:12 (Dec. 1, 1994).²

The last point is that Ludington's proposed settlement agreement has NFMU retaining ownership of the collection system within Buccaneer Estates and billing the park owner as a general service customer based upon its master meter. This would result in NFMU having to maintain the collection system in Buccaneer Estates without any financial contribution from the residents of Buccaneer Estates. The result would be that all of NFMU's customers, except those in Buccaneer Estates, would be paying for the operation and

²PSC Order No. PSC-94-1477-FOF-WU.

maintenance of the Buccaneer Estates collection system. To the best of the undersigned's knowledge, the Commission has never approved such a situation for obvious reasons. Further, it is certainly contrary to the longstanding policy of NFMU which is to allow mobile home parks as bulk customers only when the individual homes are not metered and the park is responsible for the operation and maintenance of the on-site collection system. (Tr. 174; 184-185).

Ludington's proposed settlement agreement is based upon the erroneous legal position that the residents of Buccaneer Estates have binding contracts requiring the park owner to provide wastewater service. This Commission and the courts have long held that the Commission can supercede contracts providing for utility service without violating the Constitutional prohibition against the impairment of contracts. In fact, one such Commission decision involves water service to Buccaneer Estates.³ In *Buccaneer Water Service's* original certificate proceeding this Commission stated:

Approximately eight customers protested that the separate charging for water service was in violation of their contracts with the utility. In *Deltona v. Mayo*, 342 So.2d 510, decided in 1977, the Florida Supreme Court stated that

³Commission Order No. 11263 issued October 25, 1982.

the Commission has no authority to vindicate breaches of private contracts, even if there was evidence to show that water and sewer facilities were included in the price of certain property sold by the developer. Therefore, this Commission has no jurisdiction to determine the validity of these protests. The remedy for such breach of private contract would be in private suits.

In a subsequent Buccaneer Estates Water Service staff assisted rate case, this Commission followed that earlier determination when the Commission required Buccaneer Water Service to bill all of its customers, including those with lifetime leases, the tariff rate.⁴

Finally, this Commission, in a well-reasoned analysis, dismissed the objection by a mobile home owners association to the certification of a utility because of an agreement with the park owner under a Prospectus which includes water and wastewater service as a part of the monthly lot rent, and that certification would greatly increase the cost of utility service to the mobile home owners.⁵ That discussion discusses the case law through the date of its issuance which is still valid law today.

⁴Commission Order No. PSC-96-1466-FOF-WU issued December 3, 1996.

⁵Commission Order No. PSC-94-0171-FOF-WS issued February 10, 1994.

ISSUES AND POSITIONS

ISSUE 1: Should the stipulation between the Office of Public Counsel and North Fort Myers Utility be approved?

Yes.

OPC and NFMU entered into a Settlement Agreement which was not accepted by Intervenors, Ludington, Gill and Divine (Ex. 3). Although the Homeowners' Association is apparently equivocating regarding its continued support of the OPC/NFMU Settlement Agreement, OPC has not sought to withdraw from the Settlement Agreement nor to change any of its positions on the issues in this case (Tr. 55). Thus, the Settlement Agreement still represents the position of OPC on behalf of the Citizens of the State of Florida and NFMU.

The material terms of the OPC/NFMU Settlement Agreement are as follows:

- ◇ NFMU will waive any right to receive payments for monthly wastewater service from December 1, 1998 through August 31, 1999,⁶ and the residents of Buccaneer Estates will begin paying monthly bills for service beginning September 1, 1999.

⁶*GTE Florida Incorporated v. Clark*, 668 So.2d 971 (Fla. 1996).

- ◇ NFMU will waive its right to collect the pass through charges imposed by the park owner pursuant to Chapter 723, Florida Statutes, which were assigned to NFMU.
- ◇ The parties agree to support dismissal of the Commission's Show Cause proceeding against NFMU without penalty.
- ◇ The Settlement Agreement does not affect the rights of the residents of Buccaneer Estates to pursue their contract rights against the park owner pursuant to Chapter 723, Florida Statutes.

It was obvious from the customer testimony that the Intervenor between the time of the originally scheduled hearing date of September 14, 1999 and the rescheduled hearing date of October 13, 1999 intimidated those residents who disagreed with their position, particularly the members of the Board of Directors of the Homeowners' Association. One Board member, Shirley Milligan, summed it up: "You two gentlemen [referring to Ludington and Devine] - I'm sorry - have called me names. You have accused me of things in the Blo Hard".⁷ As the President of the Homeowners' Association stated, the Settlement Agreement was the result of

⁷This is a newsletter written by Ludington, Devine and Gill and distributed within the park.

negotiations between the Homeowners' Association through OPC, and NFMU, and when voted on at an association meeting, over 300 persons voted to accept it. In fact, the president and members of the Utility Committee signed the Settlement Agreement with the following notation:

We request the Public Counsel to execute the above Settlement Agreement on behalf of all of the members of the Buccaneer Homeowners Association. (Ex. 3).

The Homeowners' Association has not stated any legal basis sufficient to allow it to withdraw from the Settlement Agreement and thus the Homeowners' Association is still bound by it. See, for example, *Crown Ice Machine Leasing Company v. Senter Farms, Inc.*, 174 So.2d 614 (Fla.2d DCA 1965).

In fact, it is unclear as to whether the Homeowners' Association really wanted to withdraw from the OPC/NFMU Settlement Agreement or whether it was just trying to get a better deal at the last minute while continuing to want the benefits of the OPC/NFMU Settlement Agreement. The Homeowners' Association's attorney testified:

Obviously, we would all rather see you agree with us and go with Mr. Ludington's proposal instructing North Fort Myers Utility to bill MHC or its affiliates directly. That's obviously our first choice.

If we can't have that, then we'll back up to our second choice, which was the agreement that the Public Service - that the Office of the Public Counsel signed with North Fort Myers Utility (Tr 80).

Since this Commission cannot and should not accept the Ludington proposed settlement agreement, the Homeowners' Association, in effect, continues to support the OPC/NFMU Settlement Agreement.

The OPC/NFMU Settlement Agreement provides a fair and equitable conclusion to this matter. It resolves this matter with finality so that the residents of Buccaneer Estates will no longer fight among themselves. NFMU is more than adequately penalized for its mistake in believing Buccaneer Estates was in its service area. The residents of Buccaneer Estates received free wastewater service for nine months. The residents do not have to pay any pass through connection charges pursuant to Chapter 723, Florida Statutes, of \$462 each. Finally, the OPC/NFMU Settlement Agreement does not affect the resident's contract rights against the park owner. It also resolves the never popular surcharge issue.

ISSUE 2: Does NFMU have the financial ability to provide wastewater service to Buccaneer Estates?

Yes.

NFMU's financial ability to serve Buccaneer Estates was unquestioned at the final hearing (Ex. 2). In fact, NFMU had been serving Buccaneer Estates for almost a year at the time of the final hearing (Tr. 171). NFMU has always been able to meet its financial obligations as they arose (Tr. 132-133). NFMU is doing well on a cash flow basis; however, if the need for cash arises, NFMU's parent company has sufficient financial resources to supplement NFMU (Tr. 132).

ISSUE 3: Does NFMU have the technical ability and capacity to provide wastewater service to Buccaneer Estates?

Yes.

NFMU operates a state of the art wastewater system with reuse as the primary method of effluent disposal (PFT.3) Percolation ponds, such as those used by Buccaneer Estates, are not favored in North Fort Myers where there is a high water table (PFT. 3-4). NFMU's wastewater plant is permitted for 2.0 million gallons per day and is not operating at 100% capacity even with service to Buccaneer Estates (Tr. 171-172). NFMU has been serving Buccaneer Estates without any environmental violations and has the capacity to continue to do so in the future (Tr. 172).

ISSUE 4: What is the net book value of the assets proposed to be transferred to NFMU?

146,119.68

The collection system in Buccaneer Estates acquired by NFMU had an original cost of \$365,299.22 with accumulated depreciation of \$219,179.52 resulting in a current net book value of \$146,119.68 (PFT. 4; Tr. 131).

ISSUE 5: Is the transfer of the wastewater operations of Buccaneer Estates to NFMU in the public interest?

Yes. It is in the public interest for NFMU to provide wastewater service directly to the residents of Buccaneer Estates in accordance with the Settlement Agreement.

The arguments and legal authorities set forth in Issue 1 above address this issue and are incorporated herein.

ISSUE 6: Should NFMU be fined for violation of Section 367.071, Florida Statutes?

No.

The OPC and Homeowners' Association, as parties subject to the OPC/NFMU Settlement Agreement, urge the Commission not to impose a fine on NFMU for providing service to Buccaneer Estates prior to PSC approval. In previous argument before this Commission, NFMU has pointed out the multitude of cases where a utility has served outside of its certificated service area without

even being issued an Order to Show Cause, much less had a penalty imposed against it.


NFMU has already been penalized by foregoing over \$600,000 in revenues and capacity fees as a result of the OPC/NFMU Settlement Agreement, and further penalty would serve no useful purpose. NFMU has more than paid for this mistake.

CONCLUSION

The only competent substantial evidence in the record supports that the OPC/NFMU Settlement Agreement should be approved, and that service to Buccaneer Estates by NFMU in accordance with the terms of that Settlement Agreement is in the public interest.

Respectfully submitted on this
12th day of November, 1999, by:

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Tallahassee, Florida 32301
(850) 877 - 6555


MARTIN S. FRIEDMAN
For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Post-Hearing Statement of Issues and Positions was served via Hand Delivery upon Steve Reilly, Esquire, Office Of Public Counsel, 111 West Madison Street, Suite 812, Tallahassee, FL 32301-1906 and Jennifer Brubaker, Esquire, Florida Public Service Commission, Legal Division, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850, and by U.S. Mail to Ronald Ludington, 509 Avanti Way, North Fort Myers, FL 33917, Donald Gill, 674 Brigantine Boulevard, North Fort Myers, FL 33917 and Joseph Devine, 688 Brigantine Boulevard, North Fort Myers, FL 33917 on this 12th day of November, 1999.


MARTIN S. FRIEDMAN

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