

IN RE: Application of North Fort Myers Utility, Inc. for extension of wastewater service in Lee County, Florida.

Docket No. 981781-SU

MOTION TO RECONSIDER AND REHEAR

Pursuant to Chapter 25.060 of the Public Service Commission's (PSC) Practice and Procedures, Donald Gill (Gill) and Joseph Devine, appearing as themselves in the above captioned matter, moves this Commission to reconsider the PSC Order, PSC-99-2444-AS-SU (Order) entered December 14, 1999, and in support thereof states:

The central and controlling issue of law and fact in the Commission's Order is the highly disputed and controversial "Settlement Agreement." This agreement was made between the Office of Public Counsel (OPC), and Mr. Friedman, Counsel for North Fort Myers Utilities, Inc. (Friedman).

- 1. On or about August 20, 1999, the Settlement Agreement was authored and submitted to the Buccaneer Homeowners' Association's Board Board) by the law firm of Roosa, Sutton, Brandt & Adamski, L.L.P. (Brandt).
2. When Brandt authored and prepared the Association's "Settlement Agreement," Brandt had a pecuniary interest in the outcome of the NFMU matter before the Commission. Brandt had previously filed a six count civil action (Class Action with lifetime lease holders as a sub-class), Case No: 99-1733 CA LG "Class Representation," in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida on behalf the of Association against Manufactured Homes Inc., et al (owners of park).
3. On or about August 26, 1999 a special meeting of the residence to vote on the proposed Settlement Agreement was improperly called for by the Board.
4. At the meeting the residents present were told by the Board that the vote taken that night was to let OPC know "... we are interested only." Yet, this vote was used throughout

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these proceedings by Brandt, Board, OPC, PSC's Staff (Staff) and NFMU to bind the residents to a non-binding Settlement Agreement.

Excerpt from BHA meeting August 26, 1999 when Settlement agreement was supposedly ratified by the residents (audio tape available):

Durbin (Sewer Committee): Giving a vote to approval to OPC so they can say all the people approve.

Colvin (Sewer Committee): Just need a simple Majority to tell OPC -- sounds like a good agreement. Vote doesn't give full authority to go ahead. Lets OPC know we are interested only

Question from lady in audience (paraphrased): Lady expressed concerned if the vote would count when the people (majority of residents) up north came back and did not agree with vote.

Colvin (paraphrased): This is a vote of confidence of the people now in the park.

5. Ludington, Devine and Gill opposed and would not stipulate to the Settlement Agreement because it did not represent the will of the residents; whereas, it is use as the controlling issue in this matter it should have been considered null and void without any legal force and effect.
6. The Board wrongly represented the Settlement Agreement as the will of the residents of Buccaneer Estates.
7. On many occasions Ludington, Devine and Gill complained of the use of the non-binding Settlement Agreement to the Board, OPC and the Staff.
8. The Board, OPC and the Staff ignored Ludington, Devine and Gill's complaints and blatantly presented the non-binding Settlement Agreement to the Commissioners as a binding document that represented the will of the residents.
9. The Staff also used the non-binding Settlement Agreement to justify the "public interest" in its November 16th summation to the Commissioners.
10. At the November 16, 1999, PSC Summary Hearing the Commissioners were misled by the Office of Public Counsel (OPC), the Commission Staff (Staff) and Mr. Friedman, Counsel for North Fort Myers Utilities, Inc. (NFMU), that the Settlement Agreement, a matters indispensable to the Commissioners reaching a fair and informed decision, was the will of the residents of Buccaneer Estates.

11. The OPC charged by Florida Law to represent the citizens of the state of Florida, did not and could not represent a corporation or a board of a corporation (Buccaneer Homeowners' Association, Inc.) and sign the Settlement Agreement on their behalf.
12. The Buccaneer Homeowners' Association, Inc. (Association) was not a "Party of Record in the above captioned matter.
13. The Association on or about March 2, 1999 the Buccaneer Homeowners' Association (Association) retained the law firm of Roosa, Sutton, Brandt & Adamski, L.L.P. (Brandt) to represent the Association:

"... full authority to act in our behalf and to represent us in any litigation concerning our rental agreement and/or dispute as to rents charged pass through charges or pass-on charges."

14. Brandt while retained by the Board to represent the BHA in Rent/Sewer matters, Brandt did not file an appearance on behalf of the Association in the above captioned matter.
15. The sentence beginning the second paragraph on page 8, section 7, in the Order under the Commission's FINDINGS OF FACTS AND CONCLUSION OF AND POLICY it states:

"OPC had originally been asked by the Buccaneer Estates Homeowners' Association to represent the Association and sign the settlement agreement." (underlining added)

16. The OPC exceeded its jurisdiction, i.e., "to represent the BHA."
17. The last sentence of the second paragraph on page 8, section 7, in the Order under the Commission's FINDINGS OF FACTS AND CONCLUSION OF AND POLICY it states:

"However, after subsequent conversations with the Homeowners Association, OPC renewed and clarified its support of the OPC/NFMU Agreement in its brief filed November 12, 1999, as well as during its closing arguments on November 16, 1999."

18. The brief filed on November 12, 1999 by OPC was not received by Ludington, Devine and Gill prior to and including the day of the hearing.

19. Contrary to the Commission's policy of "timely notice," the OPC failed to timely notify all the parties of record (Devine, Gill and Ludington) of its change in its position, i.e., reversing its position and now supporting the "Settlement Agreement."
20. Since the Staff and the attorney for North Fort Myers Utility (Friedman) knew of OPC's change in position it can be assumed that they were given timely notice.
21. Even if the PSC's policy allowed new evidence to be entered and used by any party after the adjournment of the Administrative Hearings, OPC's failure to timely notify all the parties of record of its change in position completely surprised Ludington, Devine and Gill.
22. It was not until after Ludington, Devine and Gill had exhausted their 5 minutes of final arguments when OPC (Shreve) announce that OPC supported the Settlement Agreement that they first learned that the Settlement Agreement had been resurrected and was being used to support NFMU's Application for Extension its Service Area.
23. The OPC's failure to timely notify Ludington, Devine and Gill effectively denied them of their right to be heard and defend against the resurrection of the Settlement Agreement.
24. OPC's reversal of position was not only used by OPC, but also by the Staff and Friedman in their final arguments to support of the "Settlement Agreement."
25. The Staff also used the resurrected Settlement Agreement to assert and support the "public interest."
26. The OPC misrepresented the facts to the Commissioners when it stated that the membership of the Buccaneer Homeowners' Association (BHA) was in favor of the proposed "Settlement Agreement."
27. The Staff misrepresented the facts to the Commissioners when it stated that the membership of the BHA was in favor of the proposed "Settlement agreement."
28. Friedman misrepresented the facts to the Commissioners when he stated that the membership of the BHA was in favor of the proposed "Settlement agreement."
29. The Settlement Agreement has not been properly ratified by the residents of Buccaneer Estates.
30. The Board acted beyond its powers when it asked the OPC to support the Settlement Agreement.

31. The OPC and the Staff were fully informed by Ludington that a larger number of residents rejected (actual signed ballots) the Settlement Agreement than had approved (show of hands) of a "none counting vote" (Association meeting of August 26, 1999).
32. The Staff used the Settlement Agreement to justify a questionable "public interest."
33. The Buccaneer Homeowners' Association Board was not authorized by the membership to unilaterally act in their behalf in all matters concerning the "Settlement agreement."
34. The Commission's Order failed to rule on the disposition of Ludington, Devine and Gill's rights and obligations since they did not assent to the Settlement Agreement. The Settlement Agreement agreed to by the Association consented to NFMU's charging retroactively to September 1, 1999. However, Ludington, Devine and Gill did not voluntarily give up any of their federal or state guaranteed civil rights, i.e., being obligated to pay NFMU before the fact of NFMU being legally permitted to extend its service territory.
35. The profession and fiduciary duty of the members of the Public Service Commission Staff, the Office of Public Counsel, Brandt, Friedman and the Board in the travel of the above captioned matter through the PSC Administrative Procedures has been laced with fraud, deception and surprise.
36. At the Public Service Commission's (PSC) Hearing on October 14, 1999, held in Buccaneer Estates, North Fort Myers, the Buccaneer Homeowners' Association's Board (Board), entered into the record, through and by its attorney Brandt and the OPC, that it withdrew its support for the "Settlement Agreement" that it previously sponsored.
37. Even if the Settlement Agreement was valid, without a new vote of the residents, the Board's October 13th, voluntary withdrawal from the Settlement Agreement effectively made the Board's "Settlement Proposal" null and void having no legal force and effect.
38. The unauthorized reversal of the Board's position just prior to the November 16th Administrative Hearing was well known by the OPC, Staff, and Friedman, yet no notice of this knowledge was conveyed to Devine, Ludington and Gill.
39. In reversing its October 13, 1999 position the Board acted without the authority of its membership.
40. The Office of Public Counsel (OPC) withheld material information from Ronald Ludington (Ludington), Joseph Devine (Devine) and Donald Gill (Gill), all parties of

record, effectively denying them of their federal Constitution Right (14th Amendment) and their Florida Constitutional Right (Article I, Section 9) of due process.

41. Before the new and previously undisclosed information was introduced into the closing argument phase of the proceedings; Ludington, Devine and Gill had exhausted their five minutes to summarize their positions and were procedurally barred from further participation in the summation portion of the hearing and to participate in the Staff's presentation of its recommendations. Again Ludington, Devine and Gill were effectively denied their right of due process by the OPC's intentional withholding and the late use of new facts that appeared to be for the sole purpose of evading examination by Ludington, Devine and Gill.
42. This new and previously undisclosed information had a direct influence on the Commissioners' decision allowing North Fort Myers Utility, Inc.'s (NFMU) Application for extension of service.
43. In the afternoon section of the November 16th Administrative Hearings, Commissioners Clark and Jacobs expressed several concerns over the Staff's recommendations, but went along with the Staff's recommendations for reasons that can be effectively rebutted if this matter is favorable reconsidered and Ludington, Devine and Gill have the opportunity to orally argue the merits of this matter.

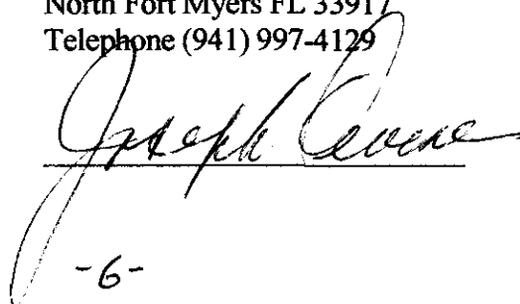
WHEREFORE: Donald Gill and Joseph Devine respectfully request this Commission to **RECONSIDER** its December 14, 1999 Order and to **HEAR ORAL ARGUMENTS** on the merits of this matter at a date the Commission may deem proper.

Respectfully submitted on this 22nd day of December, 1999, by:

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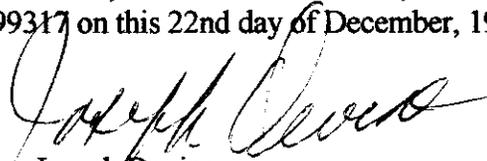
Joseph Devine
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CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that a true and correct copy of the foregoing hand-delivered Steve Reilly, Esq., Office of Public Counsel, 111 West Madison Street, Suite 812, Tallahassee Fl 32301-1906, Jennifer Brubaker, Esq., Florida Public Service Commission, Legal Division, 2540 Shumard Oak Boulevard, Tallahassee FL32399-0850, Martin Friedman, Esq., 2548 Blairstone Pines Drive, Tallahassee FL 32301, Ronald Ludington, 509 Avanti Way, North Fort Myers FL 99317 on this 22nd day of December, 1999.



Joseph Devine