

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for ) DOCKET NO. 930724-SU  
amendment of Certificate No. ) ORDER NO. PSC-96-0345-FOF-SU  
247-S and for a limited ) ISSUED: March 11, 1996  
proceeding to impose current )  
wastewater rates, charges, )  
classifications, rules and )  
regulations, and service )  
availability policies for Lazy )  
Days Mobile Village by North )  
Fort Myers Utility, Inc., and )  
for cancellation of Certificate )  
No. 174-S issued to Sun-Up )  
South, Inc. in Lee County. )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON  
DIANE K. KIESLING

ORDER GRANTING MOTION FOR A FINAL ORDER,  
ADOPTING THE FINDINGS OF ORDERS NOS. PSC-94-1553-FOF-SU AND  
PSC-95-0419-FOF-SU, GRANTING MOTION TO STRIKE REPLY AND  
CLOSING DOCKET

BY THE COMMISSION:

BACKGROUND

On July 21, 1993, North Fort Myers Utility, Inc. (NFMU or utility) filed an application for amendment of its Wastewater Certificate No. 247-S to include service to the Lazy Days Village subdivision (Lazy Days) and an application for a limited proceeding to implement its rates and charges to those customers. The application proposed to cancel the certificate of the utility owned by Lazy Days' original owner, Sun-Up South, Inc. (Sun-Up).

On June 13, 1994, we issued Order No. PSC-94-0726-FOF-SU, a proposed agency action (PAA) order which granted the amendment of NFMU's certificate, cancelled Sun-Up's certificate, and approved the limited proceeding to apply NFMU's rates and charges to the customers of Sun-Up. The order provided for temporary rates and charges in the event of protest.

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FPSC-RECORDS/REPORTING

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On July 5, 1994, a protest to Order No. PSC-94-0726-FOF-SU was filed. On October 24, 1994, the Office of Public Counsel (OPC) filed a notice of intervention in this docket, which we acknowledged on October 31, 1994, by Order No. PSC-94-1343-PCO-SU.

The technical hearing in this matter was set for January 4, 1995. On October 27, 1994, the parties filed a stipulation proposing that the only remaining issues to be resolved by the Commission were the appropriate amount of service availability charges to be paid to NFMU, and whether the Commission should establish a new "senior citizen mobile home owners" category for service availability charges. The protestors agreed to withdraw their protests as to the remaining portions of the PAA order. NFMU agreed not to collect any service availability charges from customers of Sun-Up until the final determination of the proper amount of service availability charges. On December 12, 1994, we issued Order No. PSC-94-1537-FOF-SU, approving the stipulation and ordering that the portions of Order No. PSC-94-0726-FOF-SU that were not in dispute were final and effective.

On December 13, 1994, NFMU filed a Motion for Summary Disposition. NFMU argued that the issues in this docket are identical to those in Dockets Nos. 930373-SU and 930379-SU, which concern NFMU and the Lake Arrowhead Village, Inc. (LAVI) system. NFMU alleged that in light of the decision made in Dockets Nos. 930373-SU and 930379-SU in Order No. PSC-94-1553-FOF-PSC-SU, it would not be prudent to hold a hearing in this matter.

A Prehearing Conference was held on December 16, 1994. The parties initially agreed to request a continuance of the January 4, 1995 hearing in order to properly address NFMU's motion. The parties then stipulated to the following: the final decision in Dockets Nos. 930373-SU and 930379-SU is binding upon and shall become the final decision in this docket. OPC requested and was granted additional time to file a motion for reconsideration of Order No. PSC-94-1553-FOF-SU until January 6, 1995.

OPC filed a Motion for Reconsideration of Order No. PSC-94-1553-FOF-SU on January 6, 1995. We granted this motion in part and denied it in part by Order No. PSC-95-0419-FOF-SU, issued March 27, 1995. In our order, we struck those portions of Order No. PSC-94-1553-FOF-SU which were not based on the record, but found that "despite the amendment of our order, our ultimate decision in Order No. PSC-94-1553-FOF-SU remains correct and is in fact supported by the record."

On April 25, 1995, OPC filed a notice of appeal of the final order and the order regarding reconsideration in the LAVI dockets. On October 19, 1995, the First District Court of Appeal issued an order to show cause why OPC's appeal should not be dismissed for lack of jurisdiction, on the grounds that this Commission did not have the authority to extend the filing for reconsideration of Order No. PSC-94-1553-FOF-SU. The Court cited City of Hollywood v. Public Employees Relations Commission, 432 So.2d 79 (Fla. 4th DCA 1983), which held that an agency cannot extend the time for filing a motion for reconsideration in an administrative proceeding, absent express authority. On November 16, 1995, the Court issued an order dismissing OPC's appeal for lack of jurisdiction.

NFMU'S MOTION FOR A FINAL ORDER

On November 29, 1995, NFMU filed a Motion for Final Order, requesting that we issue a final order requiring the customers of Lazy Days to pay NFMU a service availability charge of \$740. NFMU stated that the parties stipulated that the final decision in the LAVI dockets would become the final decision in this docket. Because the First District Court of Appeal dismissed the LAVI appeal, the appellate rights in that case have been exhausted and the final decision should govern in this matter.

In its December 11, 1995, response OPC argued that it was essential to the agreement that the motion for reconsideration be filed after the Commission approved the stipulation, and that any adverse decision would be reviewable, on the merits, by the appellate court. OPC contended that it sought an extension of time to file for reconsideration at Staff counsel's suggestion, and that Staff and Commission counsel represented that the Commission had the authority to grant the extension. OPC argued that because the appeal was not considered on the merits, there was no "meeting of the minds" that made the stipulation possible and that the error is so material as to constitute a recession of the stipulation. OPC stated that without the extension of time, the stipulation is unfair, and deprives the Lazy Day customers of their due process rights. Finally, OPC stated that because the parties are now in the same position prior to the stipulation, we should grant the customers a formal hearing, or in the alternative, stipulate that the record of the first case is the record of the second case and permit the customers to appeal that decision. NFMU filed a reply to OPC's response on December 22, 1995, which we have addressed below.

The court's dismissal of the appeal based upon lack of jurisdiction was not an expected outcome of OPC's appeal. The parties, Staff counsel, Commission counsel, and the Prehearing

Officer all expressed no knowledge of the Hollywood case at the Prehearing Conference regarding the Commission's authority to grant the extension of time. However, this Commission confessed error in the November 7, 1995, response to the Court, agreeing that we did not have the authority to grant the extension.

Our analysis of this issue is made more difficult because the stipulation was not executed in writing. However, it was made on the record by OPC at the Prehearing:

We will stipulate that the final decision in the first case is binding or becomes the final decision in the second case, with us, of course, losing none of our due process rights which would be motion of reconsideration, appeals, or whatever.

Counsel for the utility stated his understanding regarding the stipulation in essentially the same terms:

My understanding of the stipulation is that North Fort Myers Utility agrees to be bound in the Lazy Days case by whatever ultimately happens in the Lake Arrowhead case after all procedural rights by both parties are followed through.

While there was some initial discussion about the filing of the motion for reconsideration, OPC's concerns about the timing of the filing of the motion did not arise until after the parties had stipulated on the record to the joinder of the two dockets. It was after that agreement was reached that discussion was raised by OPC concerning when the Commission could approve the settlement. OPC then initiated discussion regarding its motion for reconsideration. The discussion of these issues was confusing at times. It was not clear at the time of the Prehearing whether OPC would definitely file the motion for reconsideration.

We find that OPC's extension of time was not a part of the stipulation entered into by the parties. The stipulation was stated on the record before the discussion regarding the extension arose. Order No. PSC-95-0109-S-SU, issued January 24, 1995, which approved the stipulation, did not include the extension of time as an element of the stipulation but noted it separately.

OPC further asserted that the stipulation required that the decision be reviewed "on the merits." That phrase or intention does not appear in the stipulation stated above. In choosing to

tie the two outcomes together, the parties must have been aware of the risks associated with the appellate process. At any point in the course of an appeal, a procedural error or failure to follow rules can effectively dismiss or at least harm a party's case. There was no requirement in the parties' stipulation that the decision be reviewed "on the merits."

OPC has not demonstrated any grounds upon which the agreement between OPC and NFMU may be rescinded. Therefore, we find it appropriate to grant NFMU's motion. We have determined in Dockets Nos. 930373-SU and 930379-SU that Orders Nos. PSC-94-1554-FOF-SU and PSC-95-0419-FOF-SU are final and no further action is necessary. Therefore, we find it appropriate to acknowledge that the final results of Dockets Nos. 930373-SU and 930724-SU represent the final determination in this matter and are controlling in this docket. Specifically, we will not establish a senior citizen mobile home class of customers. Furthermore, NFMU is authorized to collect its service availability charge of \$740 in the manner set forth in Order No. PSC-94-1553-FOF-SU.

OPC'S MOTION TO STRIKE REPLY

NFMU filed a reply to OPC's response on December 22, 1995. In that reply, NFMU objected to OPC's argument that the stipulation should be rescinded. On December 27, 1995, OPC filed a motion to strike NFMU's reply, alleging that our rules do not permit a reply to a response.

We have considered all issues raised in NFMU's initial motion and OPC's response. Moreover, our rules do not contemplate a reply to a response. The pleading cycle must stop at a reasonable point. Therefore, we find it appropriate to grant OPC's motion to strike.

This Order is the final determination of the issues in this docket in that it adopts the findings of Orders Nos. PSC-94-1553-FOF-SU and PSC-95-0419-FOF-SU as stipulated by the parties. No further action is necessary and this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the motion for a final order filed by North Fort Myers Utility, Inc., is hereby granted. It is further

ORDERED that the findings in Orders Nos. PSC-94-1553-FOF-SU and PSC-95-0149-FOF-SU are hereby adopted as the final disposition in this proceeding. It is further

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ORDERED that North Fort Myers Utility, Inc. is authorized to collect its service availability charge of \$740 in the manner set forth in Order No. PSC-94-1553-FOF-SU. It is further

ORDERED that the Office of Public Counsel's motion to strike the reply filed by North Fort Myers Utility, Inc., is hereby granted. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 11th day of March, 1996.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

by: Kay Deegan  
Chief, Bureau of Records

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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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater 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.