BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of HUGH KEITH against BEVERLY BEACH ENTERPRISES, INC. d/b/a BEVERLY BEACH SURFSIDE UTILITY CO. for overcharge of contributions-in-aid-of-construction in Flagler County.	)	DOCKET NO. 890450-WS ORDER NO. 22605 ISSUED: 2-26-90

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD
JOHN T. HERNDON

ORDER DISPOSING OF COMPLAINT

BY THE COMMISSION:

Pursuant to notice, a formal hearing was held on November 8, 1989, in Tallahassee, Florida.

APPEARANCES:

BEN E. GIRTMAN, Esquire, Suite 207, 1020 E. Lafayette Street, Tallahassee, Florida 32301
On behalf of Hugh Keith

MARTIN S. FRIEDMAN, Esquire, Rose, Sundstrom, & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301
On behalf of Beverly Beach Enterprises, Inc. d/b/a Beverly Beach Surfside Utility Co.

DAVID C. SCHWARTZ, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff

PRENTICE P. PRUITT, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0850
Counsel to the Commissioners

CASE BACKGROUND

This case involves a complaint by a developer-customer, Mr. Hugh Keith, against Beverly Beach Surfside Utilities (Beverly Beach or utility) for overcharge of contributions-in-aid-of-construction (CIAC). In his complaint, Mr. Keith alleges that Beverly Beach charged him $235,943, in excess of an amount agreed upon orally, in excess of that approved in Order No. 15504, and in excess that allowed by Rule 25-30.580, Florida Administrative Code. Mr. Keith requested relief in the form of a refund.

The complaint further requests determination of the amount of imprudent expenditures made regarding construction of new water and sewage treatment plants. The complaint was amended to include an allegation that Beverly Beach charged Mr. Keith for water and sewer service before receiving authorization from the Commission.

Beverly Beach operated from 1974 through 1985 as a nonjurisdictional entity, since it did not specifically charge for water or sewer service. The utility's only customers were a recreational vehicle (RV) park and a mobile home park, both owned by Beverly Beach Enterprises, Inc., the parent corporation of the utility. On January 9, 1985, the utility filed an application for original certificates in order to charge the mobile home park for water and sewer service, as Beverly Beach Enterprises, Inc. planned to sell the mobile home park. On February 20, 1985, the mobile home park was sold to Mr. Hugh Keith. The utility was thereafter granted original water and sewer certificates in Order No. 15504, issued December 26, 1985.

On November 18, 1986, Mr. Keith sold the mobile home park to Atlantic 1st Properties, Inc. Before Beverly Beach would release a mortgage on the park, however, it required Mr. Keith to pay $235,943 for a share of costs regarding the construction of new water and sewage treatment plants, as required by the Department of Environmental Regulation (DER). Mr. Keith paid such amount "under protest", then filed a complaint in the Broward County Circuit Court on March 2, 1987. Venue was transferred to the Flagler County Circuit Court on October 6, 1987. On June 20, 1988, the Circuit Court ordered that an application be made to the Commission for determinations of the proper amount of Mr. Keith's share of CIAC and of the

reasonableness of certain plant expenditures. Mr. Keith filed a complaint with the Commission on March 28, 1989.

MR. KEITH'S PROPER AMOUNT OF CIAC

It is a well established administrative law principle that the burden of proof is on the party asserting the affirmative of an issue. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977). Mr. Keith is asserting the affirmative that Beverly Beach collected an improper amount of CIAC from him and, therefore, carries the burden of proof on this issue.

The Alleged Oral Agreement to Limit CIAC

Mr. Keith testified that he reached an agreement with Beverly Beach Enterprises, Inc. to limit his pro rata share of the plant improvement costs to $125,000. Mr. Sid Patel, on behalf of Beverly Beach, testified that no oral agreement to limit Mr. Keith's share was reached. We believe that the this issue should be resolved by judging the actions of the parties against our past Orders. In Orders Nos. 15504 and 18553, we specifically recognized the contract between Mr. Keith and Beverly Beach as the service availability policy. In Order No. 15504, at page 7, we stated:

> The sales contract contains a provision that the mobile park would pay its pro rata costs of the new water treatment plant and the new sewage treatment plant.

Order No. 18553, at page 4, reads:

> The provision of the original contract for sale which specified that the mobile home park would pay its pro rata share of the cost of the new plants was recognized by Order No. 15504, issued in the utility's certification proceeding as the service availability policy for the utility.

The contract makes no reference to a specific dollar limit to Mr. Keith's share of plant improvements. Mr. Patel testified that the new plant construction costs were not known at the time of the contract, which was not contested by Mr. Keith and

which is supported by the two Orders. We believe this suggests that the parties would not have attempted to set any specific dollar limit at the time of the contract. Further, the contract, by its terms, voids prior agreements not specifically made part of the contract.

We find that Orders Nos. 15504 and 18553 only recognized as the service availability policy what was specifically written in the contract. Even though we had the authority to to modify or reject the contract, we chose to approve the contract in our Orders. Since no specific dollar limit on Mr. Keith's share of CIAC appears in the contract, and the contract voids any prior agreements not specifically made part of the contract, we find it appropriate to give no weight to any alleged oral agreement in resolving this issue.

Orders Nos. 15504 and 18553

Mr. Keith argues that the CIAC he paid was in excess of the amount set in Order No. 15504. The Order recites the amounts paid by the mobile home park to reserve capacity in the new water and sewage treatment plants, $45,972.50 and $66,944.50, respectively, for a total of $112,917. Mr. Keith specifically cites the portion of Order No. 15504 which states:

> The sales contract contains a provision that the mobile home park would pay its pro rata costs of the new water treatment plant and the new sewage treatment plant. The mobile home park has made these payments and, although growing, the mobile home park will not make any further CIAC payments. These payments reserve capacity for the entire area served by the mobile home park.

As stated earlier, Beverly Beach produced uncontroverted evidence showing that Order No. 15504 was based upon estimates, as the final costs of plant construction were unknown at the time of the Order, and that Order No. 18553 was based upon final costs. The suggestion that Order No. 15504 established the mobile home park's final responsibility for its share of plant costs is perhaps due to one inartfully drafted sentence in that Order, stating that the mobile home park had completed CIAC payments. In Order No. 18553, the most recent order establishing CIAC, we approved a greater level of CIAC paid by

the mobile home park than in Order No. 15504. Therefore, we find that Order No. 18553 clarifies any potential ambiguity on this issue and is controlling.

Order No. 18553 established the mobile home park's share of CIAC at $236,447, excluding ratemaking adjustments. Mr. Keith produced uncontroverted evidence that he paid a total of $235,943. Mr. Keith testified that within one week after selling the mobile home park in 1986, he repurchased a 10% interest. Order No. 18553 was issued on December 16, 1987, while Mr. Keith was still a 10% owner of the park, which was one of the two general service utility customers. Mr. Keith never testified or alleged that he did not have notice of the staff-assisted rate proceedings that culminated in Order No. 18553. Mr. Keith testified that he did not protest Order No. 18553. Based on the foregoing, we find that the amount of CIAC paid by Mr. Keith was approved in Order No. 18553.

Delay in Filing Complaint

Mr. Keith testified that he paid the CIAC under protest and went directly to the Circuit Court and filed suit. Mr. Keith argues in his brief that Beverly Beach delayed the filing of this complaint before the appropriate forum by requesting a change in venue and then objecting to the jurisdiction of the Circuit Court. We believe that Mr. Keith should take some responsibility for the delay as well. More than three months elapsed from the time he paid the CIAC under protest until he filed a complaint in the Broward County Circuit Court. More than nine months passed from the time the Flagler County Circuit Court ordered the parties to make application to the Commission until a complaint was actually filed with us. Order No. 18553 was issued more than a year before the complaint was filed with us. Mr. Keith testified that nothing prevented him from filing a protest to Order No. 18553 while the complaint was pending in court, other than his lack of understanding of the process. We find that Mr. Keith's argument concerning delay is unpersuasive and that Order No. 18553 must be enforced.

Failure to Inform Commission of Court Action

Mr. Keith alleges in his brief that Beverly Beach failed to inform us of the complaint pending in the Circuit Court during the staff-assisted rate proceeding culminating in Order No. 18553. We believe that Hugh Keith should share some

responsibility for that failure, as he was one of two general service customers at the time and had a substantial interest to protect. Mr. Keith does not make the connection of how this information would have influenced our decision in Order No. 18553. The Court ultimately deferred to us on the issue of CIAC. That issue was determined in Order No. 18553. We find that Mr. Keith has raised no new information regarding this issue which would call for a result different from that in Order No. 18553.

Rule 25-30.580, Florida Administrative Code

Witness Frank Seidman, on behalf of Hugh Keith, testified that the CIAC paid by Mr. Keith exceeded the guidelines of Rule 25-30.580, Florida Administrative Code. Paragraph (1)(a) of the Rule states:

> The maximum amount of contributions-in-aid-of-construction, net of amortization, should not exceed 75% of the total original cost, net of accumulated depreciation, of the utility's facilities and plant when the facilities ant plant are at their designed capacity.

Mr. Seidman testified that the original cost of the plant is $387,495, that the mobile home park's pro rata share is $208,442, and that 75% of the park's share is $156,331. Therefore, he concluded that Mr. Keith paid $79,612 in excess of the maximum amount of CIAC allowed by the Rule.

We find Mr. Seidman's testimony to be wholly unpersuasive in that he applied the 75% maximum to Mr. Keith's pro rata share of plant costs, not to "total original cost", as stated in the Rule. Mr. Seidman, in fact, admitted in his testimony that the percentage of CIAC to total original cost in Order No. 18553 is 71.1% for water and 50% for sewer. Therefore, we find Order No. 18553 to be consistent with Rule 25-30.580, Florida Administrative Code.

The Mobile Home Park's Pro Rata Share of CIAC

Mr. Keith testified that when he sold the park there were 66 vacant lots out of 263 total lots, so the park could not have been responsible for over two-thirds of the "utility consumption". Mr. Keith offered no other support for his opinion.

Order No. 18553, at page 3, states:

> The contract for sale specified that the mobile home park would pay its pro rata share of the cost of improvements to the water and sewer plants. Under this contract, the park's share is 71%.

We find that Mr. Keith has not met his burden of proving that his pro rata share of the plant costs was incorrectly determined in Order No. 18553.

Estoppel by Laches

In his brief, Mr. Keith argued that as a result of Beverly Beach continuing to litigate in the circuit court and then challenging jurisdiction on grounds that proper jurisdiction lies with the Commission, the utility is guilty of laches and is estopped from reliance upon our prior Orders.

Estoppel by laches, an equitable doctrine, is the failure to do something which should have been done or to claim or enforce a right at a proper time. As discussed above, Mr. Keith was partly responsible for the delay, and nothing prevented him from protesting Order No. 18553 while the Court action was pending. We find that Mr. Keith's suggestion that this equitable doctrine would proscribe us from enforcing or giving effect to our past Orders is without merit.

Discriminatory CIAC

Mr. Seidman testified that Beverly Beach was able to meet the 75% criterion in Rule 25-30.580, Florida Administrative Code, by charging all the CIAC to Mr.Keith and charging nothing to the remaining customer, the RV park. However, Order No. 18553, at page 4, states:

> In reviewing the contract, we believe that this CIAC was paid to reserve capacity for future connections within the mobile home park and that there was no need for additional capacity to serve the other customer, Beverly Beach Camptown [RV park].

Mr. Keith filed a motion to amend his complaint on September 29, 1989, to include this very issue of discriminatory CIAC charges. The motion as to this issue was denied at the Prehearing Conference held on October 11, 1989. The ruling is set forth in Prehearing Order No. 22070, issued October 19, 1989. No request for reconsideration was made. Therefore, we will not address this issue.

Based upon the foregoing, we find that the $235,943 paid by Mr. Keith was established as CIAC in Order No. 18553. The CIAC level in Order No. 18553 is within the guidelines of Rule 25-30.580, Florida Administrative Code. The Order was not shown to be in error. We find that Mr. Keith has failed to meet his burden of proving that he was charged excessive CIAC.

WHETHER CERTAIN PLANT EXPENDITURES WERE PRUDENT

The utility constructed new water and sewage treatment plants during 1985. The total cost of the new plants is $332,314.62, as reflected in Order No. 18553. In the staff-assisted rate case culminating in that Order, the cost of the new plants was reviewed and audited, and was considered in the calculation of rate base, as evidenced by the Order and the testimony of Mr. Patel. Therefore, we find that the expenditures must be considered prudent, unless Mr. Keith produced new evidence showing Order No. 18553 to be in error.

Plant Capacity

Mr. Keith testified that the new plants provide close to twice the capacity actually needed, seemingly far in excess of the foreseeable needs for the service area. However, in Order No. 18553, the utility's most recent Order establishing rates, we found that the plants were 100% used and useful. As Mr. Keith's testimony was that of a non-expert, and in light of the findings in Order No. 18553, we find Mr. Keith's testimony regarding plant capacity to be unpersuasive.

Commingling of Funds

Mr. Keith testified that there has been an inadequate separation of businesses of the utility and the RV park, and that certain costs were billed to the RV park, but paid by the utility. Witness Sid Patel, on behalf of Beverly Beach, testified that the utility was a new entity unknown to

suppliers and without credit, and that suppliers billed other entities related to the utility. He testified that it is common practice for related entities to have items billed from one entity to the other, and then make adjusting book entries.

We find that Mr. Keith has not met his burden of proving an expenditure was imprudent merely by showing that the RV park, or related entity, was billed.

RV Park Fire

Mr. Keith testified that repairs to the RV park on account of fire damage were included in the cost of the new water and sewer plants, but he offered little support for the allegation and was unable to state how much damage was done to the campground. Witness Sid Patel testified that fire damage repairs were paid from the RV park's checkbook, the park was reimbursed by its insurance company, and materials used to repair the fire damage were separate from materials used to construct the water and sewer plants. Based on the foregoing, we find that Mr. Keith has not met his burden of proving these expenditures were imprudent.

Office Equipment

Mr. Keith produced exhibits showing that the plant costs included a copy machine, file cabinets, and an office desk and chair. Mr. Keith testified that these expenditures are not for plant construction and are particularly unreasonable because the parent company's divisions are co-located.

Beverly Beach witness, Sid Patel, testified that the utility needs its own copy machine, that the file cabinet is necessary to keep up with the records of construction, and that these items were capital expenditures. Beverly Beach, in its brief, argues that the items are immaterial, as Mr. Keith's share would only be $1,642.78.

We find that all three of the above items are office equipment and are not related to the construction of the new water and sewer plants. We believe these items are not necessary for a small utility with only two customers. Therefore, we find the following expenditures to have been imprudently made:

Copier	$1,386.00
File Cabinets	317.42
Desk and Chair	569.10
Total	$2,272.52
	x 71%
Keith's Share	$1,613.49

Based on the foregoing, we find it appropriate to require Beverly Beach to refund to Mr. Keith his pro rata share (71%) of these items, or $1,613.49, with interest pursuant to Rule 25-30.360, Florida Administrative Code.

Other Items

Mr. Keith testified and produced exhibits in an effort to prove that numerous other expenditures were imprudent. Mr. Keith pointed out a bill for an air conditioner as one of the more glaring examples of imprudent expenditures. Beverly Beach witness, William McGowan, testified that the expenditures were reasonable. Beverly Beach produced exhibits, explained in the testimony of witness Sid Patel, specifically supporting the reasonableness of several bills for materials and supplies in construction of the plants. Mr. Patel showed, for example, that an invoice for an air conditioner is clearly identified for use in construction of the water plant.

Mr. Keith did not provide a total amount of the alleged imprudent expenditures. In his complaint, he requested that we determine the amount of imprudent expenditures. Although Mr. Keith compiled a large collection of bills and checks, we find that he has not met his burden of proving that these expenditures were imprudent. Therefore, we find that Order No. 18553 must not be disturbed, except as to the office equipment discussed above.

WATER AND SEWER SERVICE CHARGES COLLECTED BEFORE AUTHORIZED

The exhibits and testimony of both parties show that Beverly Beach began charging Mr. Keith $2,000 per month in March of 1985 for water and sewer service and that the $2,000 deposit was collected because the final rates were not known at

that time. Order No. 14753, issued August 21, 1985, authorized the collection of interim rates, effective September 5, 1985. The interim rates were the same as the final rates ultimately approved in Order No. 15504, issued December 26, 1985, and effective January 17, 1986. In October of 1985, the deposit was increased to $2,750 per month, retroactive to February of 1985. In January of 1986, Beverly Beach charged Mr. Keith $11,601.41 for water and sewer services retroactive to February of 1985, constituting the final reconciliation of deposits paid with the final rates authorized in Order No. 15504.

Beverly Beach argues, in its brief, that Mr. Keith paid the exact amount for water and sewer service as authorized in Order No. 15504. Beverly Beach introduced an exhibit showing that our staff was informed in August of 1985, during the certification proceeding, that charges for water and sewer service were made. Therefore, Beverly Beach argues that those charges were implicitly approved in Order No. 15504, wherein the utility was not fined nor required to make a refund. Beverly Beach argues that four years is too long a delay to raise this issue.

It is uncontroverted that payments were made for water and sewer service before authorized in Order No. 14753, and that payments were made retroactive to February of 1985. Contrary to the argument of Beverly Beach, Order No. 15504 does not authorize the payment of an "amount", but authorizes the charging of rates. Although Mr. Keith may have been charged those precise rates throughout 1985, they were not effective until 1986. Regarding staff's knowledge of the unauthorized charges, this information was not provided to us for our decision in Order No. 15504. Staff cannot bind the Commission. Order No. 15504 does not even implicitly approve the charging of rates for water and sewer service before the interim rates were effective. Therefore, we find that Beverly Beach charged rates without authorization of the Commission, in violation of Sections 367.081 and .121, Florida Statutes.

Though Beverly Beach should have obtained a certificate and had rates approved prior to the implementation of rates, it appears that the utility promptly applied for certificates and rates after the sale. Mr. Keith waited nearly five years before raising this issue. Based on the foregoing, we find it appropriate to fine Beverly Beach $100 for charging water and sewer rates without authorization.

It is, therefore,

ORDERED by the Florida Public Service Commission that Beverly Beach shall refund $1,613.49 with interest, pursuant to Rule 25-30.360, Florida Administrative Code, to Mr. Hugh Keith. It is further

ORDERED that Beverly Beach is hereby assessed a $100 fine for violation of Sections 367.081 and .121, Florida Statutes. It is further

ORDERED that each of the findings contained in the body of this Order is approved in all respects. It is further

ORDERED that Mr. Hugh Keith's request for relief is denied in all other respects as set forth in the body of this Order.

By ORDER of the Florida Public Service Commission this 26th day of FEBRUARY, 1990.

STEVE TRIBBLE, Director
Division of Records and Reporting

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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 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.