

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of wastewater facilities in Lee County from Forest Park Property Owner's Association (holder of Certificate No. 175-S) to North Fort Myers Utility, Inc. (holder of Certificate No. 247-S), cancellation of Certificate No. 175-S, and amendment of Certificate No. 247-S.

DOCKET NO. 991494-SU
ORDER NO. PSC-00-1892-PAA-SU
ISSUED: October 16, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.
LILA A. JABER
BRAULIO L. BAEZ

ORDER APPROVING TRANSFER AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER ESTABLISHING RATE BASE FOR THE PURPOSES OF TRANSFER AND
DECLINING TO RECOGNIZE AN ACQUISITION ADJUSTMENT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the actions discussed herein establishing rate base for the purposes of the transfer and declining to recognize an acquisition adjustment are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

Forest Park is a mobile home subdivision in Lee County which has been in existence since the early 1970's. The subdivision receives water service from Lee County. Vista Villages, Inc. provided wastewater service to the Forest Park subdivision from its inception until 1990. Vista Villages, Inc. was granted Certificate

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No. 175-S pursuant to Order No. 7010, issued November 19, 1975, in Docket No. 750592-S. In 1990, Forest Park Property Owners Association (Forest Park) obtained ownership of the utility. Certificate No. 175-S was transferred from Vista Villages, Inc. to Forest Park by Order No. PSC-92-0193-FOF-SU, issued April 13, 1992, in Docket No. 910467-SU.

By Order No. PSC-92-0588-FOF-SU, issued June 30, 1992, in Dockets Nos. 920273-SU and 920379-SU, an amendment of territory docket, and in a limited proceeding docket, this Commission granted temporary authority to North Fort Myers Utility, Inc. (NFMU or utility) to charge its rates and charges to the Forest Park customers. While Order No. PSC-92-0588-FOF-SU amended NFMU's wastewater certificate to include the additional territory of Forest Park and suspended the rates and charges for Forest Park, the Order did not cancel Forest Park's certificate. The Order states that, after numerous violations, Forest Park entered into a consent order with the Department of Environmental Protection (DEP) to interconnect with NFMU. The interconnection was completed in June 1992 and the wastewater treatment plant was dismantled.

By Order No. PSC-92-1357-FOF-SU, issued November 23, 1992, in Dockets Nos. 920273-SU and 920379-SU, this Commission approved NFMU's application for a limited proceeding and granted the request to charge NFMU's approved rates and charges to the Forest Park customers. The Order also denied NFMU's request to cancel Certificate 175-S issued to Forest Park. According to the Order, Forest Park retained ownership and maintenance responsibilities of the collection lines.

On October 4, 1999, Forest Park filed an application for authority to transfer its wastewater facilities (collection lines) and Certificate No. 175-S to NFMU. Forest Park closed on the transfer of its facilities to NFMU on August 31, 1999, prior to obtaining our approval.

Forest Park's 1999 annual report lists annual revenues of \$8,854. The annual report also includes annual operating expenses of \$11,375 resulting in a net operating loss of \$2,521.

SHOW CAUSE

As previously noted, Forest Park transferred its facilities to NFMU, on August 31, 1999, prior to obtaining our approval and

without making the transfer contingent upon our approval. Section 367.071(1), Florida Statutes, states that:

No utility shall sell, assign, or transfer its certificate of authorization, facilities or any portion thereof, or majority organizational control without determination and approval of the commission that the proposed sale, assignment, or transfer is in the public interest.... However, a sale, assignment, or transfer of its certificate of authorization, facilities or any portion thereof, or majority organizational control may occur prior to commission approval if the contract for sale, assignment, or transfer is made contingent upon commission approval.

As stated previously, Forest Park entered into a Wastewater Agreement with NFMU on March 3, 1992, whereby NFMU was to provide wastewater service to Forest Park. On August 31, 1999, Forest Park and NFMU entered into an Amendment to the Wastewater Agreement (Amendment) which transferred Forest Park's wastewater facilities and certificate to NFMU. However, the Amendment does not make the transfer contingent upon our approval.

In the Amendment, the parties ratified and confirmed the provisions of the Wastewater Agreement which did not require change to effectuate the transfer. The Wastewater Agreement had a provision which made it effective upon approval from the necessary governmental authorities. However, this provision would have required a change that indicated it applied to the transfer as well as to the original Wastewater Agreement. We find that in order to comply with Section 367.071(1), Florida Statutes, the Amendment should have contained a provision that stated that the transfer is contingent upon Commission approval. Therefore, we find that the transfer was made prior to our approval and in apparent violation of the statute.

Section 367.161(1), Florida Statutes, authorizes us to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes. In closing on the transfer of its facilities prior to our approval and without making the transfer contingent upon our approval, the utility's act was "willful" in the meaning and intent of Section 367.161, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation Into The

Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Forest Park's transfer of its facilities to NFMU prior to our approval and without making the transfer contingent upon our approval is apparent violation of Section 367.071(1), Florida Statutes. However, there are mitigating circumstances in the instant case. The Wastewater Agreement contained a provision which made the transfer effective upon approval from the necessary governmental authorities. Forest Park's attorney stated that the parties believed at the time the Amendment was executed that it contained an "unwind" provision. However, Forest Park's attorney acknowledges that upon further review the Amendment did not contain an "unwind" provision. In a letter dated September 5, 2000, the parties indicated that the transfer was not intended to and will not be consummated without specific Commission approval.

Therefore, we do not find that the apparent violation of Section 367.071, Florida Statutes, rises in these circumstances to the level which warrants the initiation of a show cause proceeding. Therefore, Forest Park shall not be ordered to show cause within 21 days why it should not be fined for its failure to obtain our approval prior to transferring its facilities or making the transfer contingent upon our approval.

APPLICATION

As stated previously, after numerous violations, Forest Park entered into a consent agreement with DEP to interconnect with NFMU. Pursuant to Order No. PSC-92-0588-FOF-SU, while the wastewater treatment plant was dismantled and NFMU began charging Forest Park's customers its rates and charges, Forest Park retained ownership and maintenance responsibilities of the collection lines. It is through the instant proceeding that Forest Park and NFMU are proposing to transfer the collection lines and to cancel Forest Park's certificate.

Forest Park applied for a transfer of its wastewater facilities in Lee County to NFMU and cancellation of Wastewater Certificate No. 175-S on October 4, 1999. As discussed above, the parties closed on the transfer on August 31, 1999. Except as discussed above, the application is in compliance with Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for transfer. The application contains a check in the amount of \$750, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code.

Since Forest Park retained ownership of only the collection system, there was a concern as to whether NFMU had continued use of the land, specifically, the land associated with the collection system, as required by Rule 25-30.037(2)(g), Florida Administrative Code. Subsequent to filing the application, Forest Park provided a perpetual easement. The perpetual easement meets the requirement of the Rule and addresses this concern.

In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code. No objections to the application were received, and the time for the filing of such objections has expired. A description of the territory served by the utility is appended to the body of this Order as Attachment A. The service area has been verified as the service area granted to Forest Park initially by Order No. 7010, issued November 19, 1975, in Docket No. 750592-S.

With regard to the purchaser's technical ability, NFMU has indicated that it will maintain and operate the system in compliance with the appropriate laws and rules. NFMU is already serving the Forest Park customers and has been serving these customers since the interconnection in June 1992. Further, NFMU was originally organized in 1977 to provide central sewer service to Old Bridge Park, a mobile home community. Since that time, the company has expanded its service area to include a large portion of the unincorporated area north of the Caloosahatchee River. Presently, NFMU serves approximately 6,682 wastewater customers.

In addition to over 20 years of experience in operating a wastewater utility, NFMU has the financial resources to ensure consistent compliance with environmental regulations. NFMU is a wholly-owned subsidiary of Old Bridge Park Corporation. Regarding the financial ability of NFMU, we have reviewed the utility's 1999

Annual Report along with three prior annual reports on file. Although the utility reported operating revenues in 1999 of \$2,139,446 and operating expenses of \$2,265,992 which resulted in an operating loss of \$126,546, in the previous three years (1996, 1997, 1998), the utility experienced operating incomes of \$219,571, \$446,362, and \$326,436, respectively. Moreover, by Order No. PSC-99-2444-AS-SU, issued December 14, 1999, in Docket No. 981781-SU, we found that the utility had the financial ability to provide wastewater service to Buccaneer Estates. In that Order, we found that "[w]hile some questions were raised with respect to NFMU's finances, we believe that nothing was identified which outweighed the evidence presented as to NFMU's overall financial ability to provide service." Id. at page 11. For purposes of this docket, we find that NFMU has the financial ability to maintain compliance with environmental regulations and to continue to provide service to the Forest Park subdivision.

The application contains a copy of the Amendment to Wastewater Agreement which includes the purchase price, terms of payment, and a list of the assets purchased and liabilities assumed and not assumed. Based on the application, there are no guaranteed revenue contracts, developer agreements, customer deposits, customer advances, debt of the utility, or leases that must be disposed of in association with the transfer of the utility.

According to our records, Forest Park is current with payment of its regulatory assessment fees through December 1999 and has filed an annual report for 1999 and all prior years. Forest Park will remain liable for any outstanding regulatory assessment fees, fines, or refunds owed until the transfer is final. Therefore, Forest Park shall be responsible for the regulatory assessment fees and the annual report information through September 30, 2000. Both utilities are current with regulatory assessment fees and annual reports for 1999.

Based on the above, the transfer of wastewater facilities of Forest Park to NFMU is approved and Certificate 175-S held by Forest Park shall be canceled. No amendment is necessary to Certificate No. 247-S held by NFMU which was previously amended to include Forest Park's service territory pursuant to Order No. PSC-92-0588-FOF-SU, issued June 30, 1992.

RATE BASE

According to the application, and based on our records, rate base was last established by this Commission in Docket No. 910467-SU, a transfer application. According to Order No. PSC-92-0193-FOF-SU, issued on April 13, 1992 in that docket, rate base was \$23,168 as of November 7, 1990.

Our staff conducted an audit of the utility's books and records to determine rate base at the time of transfer. The audit reveals that the utility correctly recorded plant and contributions-in-aid-of-construction (CIAC) based on the above-referenced Order. However, in 1992, the company wrote off the wastewater treatment plant when it interconnected with NFMU.

According to the audit, Forest Park "wrote off all but \$29,663 of plant" and all of the CIAC. Based on prior audit workpapers supporting the above-referenced Order establishing rate base, the original cost of the collection system is \$147,862. Therefore, it is appropriate to make an adjustment in the amount of \$118,229 to reflect the correct amount of utility plant-in-service associated with the collection system. Also, we have calculated the appropriate associated accumulated depreciation in the amount of \$94,365. The utility recorded accumulated depreciation in the amount of \$15,366. Therefore, we adjust this amount by \$78,999.

As stated earlier, the utility recorded a \$0 balance for CIAC. The audit revealed that a breakdown could not be found in prior audit workpapers for the original CIAC balance of \$199,552 which was established by Order No. 8275, issued April 19, 1978, in Docket No. 770688-S. The audit states that the original CIAC balance of \$199,552 was recorded before many customers were hooked up. The audit further states that no tap-in fees were included in the utility's tariff. Therefore, we conclude that most of the CIAC balance is related to contributed plant. The CIAC balance related to the collection system per the audit calculation is \$134,116 and the associated accumulated amortization is \$85,592. We concur with this calculation and adjust the utility's balance accordingly resulting in a CIAC balance of \$134,116 and an accumulated amortization of CIAC balance of \$85,592.

Our calculation of rate base is shown on Schedule No. 1. Rate base for Forest Park is established as \$4,973. This rate base calculation is used solely to establish the net book value of the property being purchased and does not include the normal ratemaking

adjustments of working capital calculations and used and useful adjustments.

Acquisition Adjustment

An acquisition adjustment results when the purchase price differs from the original cost calculation adjusted to the time of the acquisition. The acquisition adjustment resulting from the transfer of Forest Park is calculated as follows:

Purchase Price:	\$ 10.00
Staff Calculated Rate Base:	\$ 4,973.47
Negative Acquisition Adjustment:	\$ 4,963.47

In the absence of extraordinary circumstances, it has been our practice that a subsequent purchase of a utility system at a premium or discount should not affect the rate base calculation. See Order No. PSC-00-0682-FOF-WU, issued April 12, 2000, in Docket No. 990253-WU; Order No. PSC-00-0264-FOF-WS, issued February 8, 2000, in Docket No. 971220-WS; and Order No. PSC-99-1818-PAA-WS, issued September 20, 1999, in Docket No. 981403-WS. The circumstances in this exchange do not appear to be extraordinary. Also, an acquisition adjustment was not requested by the applicant. Therefore, a negative acquisition adjustment shall not be included in the calculation of rate base.

Rates and Charges

As mentioned previously, Order No. PSC 92-0588-FOF-SU granted NFMU temporary authority to charge its rates and charges within the Forest Park subdivision. In addition, Order No. PSC 92-0588-FOF-SU addressed the DEP mandate which required Forest Park to interconnect with NFMU due to numerous violations. Subsequently, Order No. PSC-92-1357-FOF-SU approved NFMU's application for a limited proceeding and granted its request to charge its approved rates and charges to Forest Park.

However, since Forest Park retained ownership and responsibility for maintenance of the collection system, the utility was required by Order No. PSC-92-1357-FOF-SU to establish a monthly lines maintenance charge. A monthly lines maintenance

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charge was established as \$1.70 per customer. Since Forest Park no longer owns or maintains the collection lines, the monthly lines maintenance charge of \$1.70 per customer shall be discontinued.

Based on the above, we find that NFMU shall continue charging the customers of Forest Park the rates approved by Order No. PSC-92-1357-FOF-SU, issued November 23, 1992, in Docket Nos. 920273-SU and 920379-SU. However, the monthly lines maintenance charge of \$1.70 per customer imposed by Forest Park shall be discontinued. The tariff shall be effective for services rendered or connections made on or after the stamped approval date, in accordance with Rule 25-30.475, Florida Administrative Code, provided the customers have received notice.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the transfer of wastewater facilities from Forest Park Property Owners Association to North Fort Myers Utility, Inc. is hereby approved. It is further

ORDERED that Certificate No. 175-S held by Forest Park Property Owners Association is hereby canceled. Forest Park Property Owners Association shall return Certificate No. 175-S to this Commission within 20 days of the date of this Order. It is further

ORDERED that rate base for purposes of this transfer is established as \$4,973. It is further

ORDERED that a negative acquisition adjustment shall not be included in the calculation of rate base for purposes of this transfer. It is further

ORDERED that Attachment A and the schedule, attached hereto, are incorporated herein be reference. It is further

ORDERED that North Fort Myers Utility, Inc. shall continue to charge the rates approved pursuant to Order No. PSC-92-1357-FOF-SU, issued November 23, 1992, in Docket Nos. 920273-SU and 920379-SU, except the monthly lines maintenance charge of \$1.70 per customer. It is further

ORDERED that tariff shall be effective for services rendered or connections made on or after the stamped approval date, in

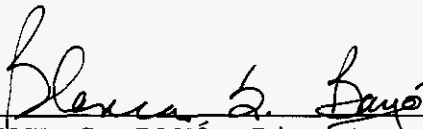
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accordance with Rule 25-30.475, Florida Administrative Code, provided the customers have received notice.

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 16th day of October, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

PAC

DISSENT:

Commissioner J. Terry Deason dissents from the decision in this Order not to recognize a negative acquisition adjustment in the calculation of rate base.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

As identified in the body of this order, our actions on establishing rate base for the purposes of the transfer and declining to recognize an acquisition adjustment, are preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 6, 2000. If such a petition is filed, mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing. In the absence of such a petition, this order shall become effective and final upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

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 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.

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Attachment A

***North Fort Myers Utility, Inc.

Forest Park Property Owners Association / Vista Village, Inc.

Order No. 7010

In Section 36, Township 43 South, Range 24 East, in Lee County, Florida.

Beginning at the Northwest corner of said Section 36; run thence South 89 degrees 46 minutes 50 seconds East, along the North line of said Section 36 and the center line of a roadway easement 50 feet wide, 25 feet either side of said centerline as declared by C.C.M. Book 5 at page 661 of the public records of Lee County, Florida, for 1650.00 feet to the Northeast corner of Lot 120, Block C of Forest Park Mobile Home Subdivision; thence South 0 degrees 19 minutes 40 seconds East, 132.00 feet; thence South 89 degrees 46 minutes 50 seconds East, 330.00 feet; thence North 0 degrees 19 minutes 40 seconds West, 132.00 feet to the Northwest corner of Lot 19, Block A, Sherwood Forest Mobile Home Subdivision; thence South 89 degrees 46 minutes 48 seconds East, 592.67 feet to the Northeast corner of the said Sherwood Forest Mobile Home Subdivision, said point also being on the West boundary of Hart Road; thence South 2 degrees 43 minutes 18 seconds East, 660 feet more or less along said West boundary of Hart Road to the intersection with the centerline of Forest Park Drive; thence North 89 degrees 46 minutes 48 seconds West, 294 feet more or less along the said centerline of Forest Park Drive to the intersection with the Northerly extension of the East boundary of Block B, Sherwood Forest Mobile Home Subdivision; thence South 0 degrees 19 minutes 36 seconds, 660 feet more or less along said East boundary of Block B to the Southeast corner of said Block B; thence North 89 degrees 47 minutes 24 seconds West, 2310 feet to the Southwest corner of Block D, Forest Mobile Home Subdivision, said point also being on the West boundary of said Section 36; thence North 0 degrees 19 minutes 36 seconds, 1319.72 feet along said West boundary to the POINT OF BEGINNING.

*** The composite North Fort Myers Utility, Inc. certificated area currently reflects the area described above, pursuant to Order No. PSC-92-0588-FOF-SU, issued June 30, 1992.

FOREST PARK PROPERTY OWNER'S ASSOCIATION INC.

SCHEDULE OF WASTEWATER RATE BASE

As of December 31, 1999

<u>DESCRIPTION</u>	<u>BALANCE PER UTILITY</u>	<u>STAFF ADJUSTMENTS</u>	<u>BALANCE PER STAFF</u>
Utility Plant in Service	\$ 29,633	\$ 118,229	\$ 147,862
Accumulated Depreciation	\$ (15,366)	(78,999)	\$ (94,365)
Contributions-in- aid-of-Construction	\$ 0	(134,116)	\$ (134,116)
CIAC Amortization	<u>\$ 0</u>	<u>85,592</u>	<u>\$ 85,592</u>
TOTAL	\$ 14,267	\$ (9,294)	\$ 4,973