

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer of facilities and Certificates Nos. 353-W and 309-S in Lee County from MHC Systems, Inc. d/b/a FFEC-Six to North Fort Myers Utility, Inc., holder of Certificate No. 247-S; amendment of Certificate No. 247-S; and cancellation of Certificate No. 309-S.

DOCKET NO. 000277-WS  
ORDER NO. PSC-00-2349-PCO-WS  
ISSUED: December 7, 2000

ORDER GRANTING PETITIONS FOR INTERVENTION AND  
GRANTING IN PART AND DENYING IN PART  
NORTH FORT MYERS UTILITY, INC.'S FIRST REQUEST FOR OFFICIAL NOTICE

On March 2, 2000, North Fort Myers Utility, Inc. (NFMU or utility) filed an Application for Transfer of Certificates Nos. 353-W and 309-S held by MHC Systems, Inc. d/b/a FFEC-Six. On May 18, 2000, Mr. Alexander William Varga, a customer, filed an objection to the transfer application. On May 30, 2000, NFMU filed a Motion to Dismiss Mr. Varga's objection. By Order No. PSC-00-1649-PCO-WS, issued September 15, 2000, the Commission denied the utility's motion. Accordingly, this matter has been set for an administrative hearing.

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

Petitions for Intervention

Pursuant to Rule 25-22.039, Florida Administrative Code, a motion for leave to intervene must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of

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the intervenor are subject to determination or will be affected by the proceeding.

Pursuant to In Re: Petition for Exceptions from the Uniform Rules of Procedure, Florida Public Service Commission, issued June 25, 1998, Final Order No. APA 98-007, the rule governing the content of a petition for leave to intervene is Rule 28-106.201, Florida Administrative Code.

Pine Lakes Homeowners Association II, Inc.

On September 18, 2000, the Pine Lakes Homeowners Association II, Inc. (PLHOA) filed a request for intervention in this docket. In its request, PLHOA states that it represents over 1,000 residents who own homes on leased lots in the Pine Lakes Country Club Community. Further, PLHOA asserts that "The interests of these residents [its members] will certainly be affected by any determination resulting from the proceeding in this case." In addition, PLHOA's request raises concerns pertaining to the wastewater treatment plant due to fines having been paid for noncompliance with the Florida Department of Environmental Protection's (DEP) rules and regulations and to the potential for additional fines being levied if the plant is not brought into compliance. PLHOA neglected to send copies to the parties. Staff counsel sent copies to the parties on September 25, 2000.

Mr. Alexander William Varga filed a timely response to the PLHOA's request on October 4, 2000. Mr. Varga's response does not state whether he is opposed to the request for intervention, but he does state that several of the facts asserted by the PLHOA regarding the Pine Lakes Residents Organization (PLRO) are false. However, the facts which Mr. Varga disputes in his response with respect to the PLRO are irrelevant because the request for intervention is on the behalf of the PLHOA and not the PLRO.

On October 9, 2000, NFMU filed a timely response in opposition to the PLHOA's request for intervention. NFMU states that the PLHOA's request is procedurally deficient because it fails to comply with Rule 25-22.036(4), Florida Administrative Code. Nevertheless, NFMU states that if PLHOA can prove standing at a formal hearing, NFMU will acknowledge that based upon PLHOA's statements, its interests are affected by this proceeding.

Pine Lakes Estates Homeowners' Association

On October 25, 2000, the Pine Lakes Estates Homeowners' Association (PLEHOA) sent a Petition for Leave to Intervene in this docket to staff counsel and copies to the parties. However, it was not officially filed until November 14, 2000, when it was discovered that the PLEHOA had not filed the petition with the Division of Records and Reporting on October 25, 2000. In support of its petition, PLEHOA asserts that all of its members are customers of MHC. Further, PLEHOA states that the members' substantial interests will be affected by the Commission's decision because the quality and cost of water and wastewater service will be affected. Additionally, PLEHOA's petition states that there are disputed issues of material fact pertaining to the financial ability of NFMU to provide quality service, the technical ability of NFMU to provide water service, public interest, and possible concerns if NFMU were to sell its entire system to Lee County at some time in the future. Lastly, PLEHOA's petition admits that it cannot state the ultimate facts at this time. However, PLEHOA states that after the results of discovery are received, it will provide the ultimate facts or that PLEHOA will include the ultimate facts in its prehearing statement.

Mr. Varga did not file a response to PLEHOA's petition.

On November 6, 2000, NFMU filed a timely response in opposition to PLEHOA's petition. NFMU states that PLEHOA's request is procedurally deficient because it fails to comply with Rule 25-22.036(4), Florida Administrative Code. Further, NFMU states that PLEHOA's petition is not signed by its authorized representative because the Department of State's records indicate that Ms. Barb Stanze, not Mr. Leon Beekman, is the President of PLEHOA<sup>1</sup>. However, NFMU states that if PLEHOA can prove standing at a formal hearing, NFMU will acknowledge that based upon PLEHOA's statements, its interests are affected by this proceeding. Lastly, NFMU states that if PLEHOA is allowed to intervene, then it should be required to clearly articulate the factual basis for its position.

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<sup>1</sup> It should be noted that on November 14, 2000, the Office of Public Counsel provided a copy of the Notice confirming Mr. Leon Beekman's election as Director and President of the PLEHOA.

Decision on Petitions for Intervention

Pursuant to Rule 25-22.039, Florida Administrative Code, PLHOA and PLEHOA have shown that their substantial interests are subject to determination or will be affected through this proceeding. As customers of the system, any determinations pertaining to whether this transfer is in the public interest affects their substantial interests. Therefore, PLHOA and PLEHOA's petitions are granted. Pursuant to Rule 25-22.039, Florida Administrative Code, PLHOA and PLEHOA, as intervenors, take the case as they find it. In addition, as previously noted, the proper rule governing the content of a petition for leave to intervene is Rule 28-106.201, Florida Administrative Code, and not Rule 25-22.036, Florida Administrative Code.

North Fort Myers Utility, Inc.'s  
First Request for Official Notice

On October 12, 2000, NFMU filed a Request for Official Notice, whereby it requests the Commission to take official notice of:

1. The transcript of the Final Hearing held on October 13, 1999, in Docket No. 981781-SU;
2. Order No. PSC-99-2444-AS-SU, issued December 14, 1999, in Docket No. 981781-SU.

Section 120.569(2)(i), Florida Statutes, provides that when official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material. NFMU served its request and copies of the above-referenced transcript, and Order on all the parties and the Commission.

Section 90.202, Florida Statutes, sets forth the matters which may be judicially noticed. Section 90.202(5), Florida Statutes, provides that official actions of the legislative, executive, and judicial departments of the United States and of any state may be judicially noticed. Section 90.203, Florida Statutes, provides that a court must take judicial notice of any matter in Section 90.202, Florida Statutes, when a party requests it and provides timely written notice and sufficient information. Therefore, it is

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appropriate to grant NFMU's request to officially recognize Order No. PSC-99-2444-AS-SU.

As to the request for official recognition of the final hearing transcript, NFMU provided no justification and the request is denied for the following reasons. First, a transcript of a hearing is not an official action of the Commission. See Order No. PSC-92-0076-PCO-EI, issued March 18, 1992, in Docket No. 911103-EI. Second, the parties to Docket No. 981781-SU were not the same parties as in this docket and have not had the opportunity to conduct cross-examination on the parties in Docket No. 981781-SU. Third, the best evidence in any case is the presentation of live testimony. See Order No. PSC-92-0326-PCO-WS, issued May 11, 1992, in Docket No. 911030-WS.

Based on the foregoing, it is

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that Pine Lakes Homeowners Association II, Inc.'s, request to intervene in this docket is hereby granted, as set forth in the body of this Order. It is further

ORDERED that all parties to this docket shall furnish copies of all pleadings and other documents that are hereinafter filed in this proceeding to Ms. Jermaine Troiano, President, Pine Lakes Homeowners Association II, Inc., 19419 Saddlebrook, North Fort Myers, Florida 33903. It is further

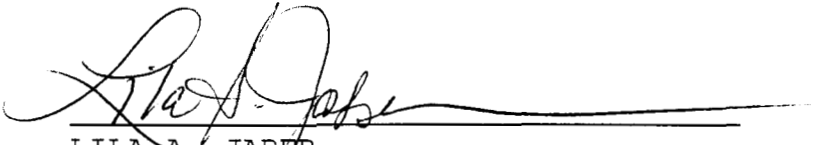
ORDERED that the Pine Lakes Estates Homeowners' Association's Petition for Intervention is hereby granted, as set forth in the body of this Order. It is further

ORDERED that all parties to this docket shall furnish copies of all pleadings and other documents that are hereinafter filed in this proceeding to Mr. Leon J. Beekman, Pine Lakes Estates Homeowners' Association, 19799 Frenchman's Court, North Fort Myers, Florida 33903. It is further

ORDERED that North Fort Myers Utility, Inc.'s First Request for Official Notice is granted in part and denied in part, as set forth in the body of this Order.

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By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer,  
this 7th day of December, 2000.

  
LILA A. JABER  
Commissioner and Prehearing Officer

( S E A L )

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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.

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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. A motion for

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reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.