BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for transfer of territory served by TAMIAMI VILLAGE UTILITY, INC., in Lee County to NORTH FORT MYERS UTILITY, INC., cancellation of Certificate No. 332-S and amendment of Certificate 247-S; and for a limited proceeding to impose current rates, charges, classifications, rules and regulations, and service availability policies.	DOCKET NO. 940963-SU ORDER NO. PSC-95-0965-FOF-SU ISSUED: August 8, 1995

The following Commissioners participated in the disposition of this matter:

JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION, AMENDING ORDER NO. PSC-95-0576-FOF-SU, AND DENYING MOTION FOR CLARIFICATION

BY THE COMMISSION:

BACKGROUND

North Fort Myers Utility, Inc. (NFMU or utility), is a Class A utility which provides regional wastewater service to approximately 2,700 customers in northern Lee County. The utility's 1993 annual report indicates an annual operating revenue of $924,000 and a net operating deficit of $150,000.

On September 13, 1994, NFMU filed an application for amendment of its Wastewater Certificate No. 247-S to include territory served by Tamiami Village Utility, Inc. (TVU), and cancellation of TVU's Wastewater Certificate No. 332-S, which we processed under Section 367.071, Florida Statutes, as an application for transfer of TVU's territory to NFMU, cancellation of Certificate No. 332-S, and amendment of Certificate No 247-S. On the same date, NFMU also filed a request for a limited proceeding to impose its current rates, charges, classifications, rules and regulations, and service availability policies upon TVU's existing customers and service area.

Upon notification, numerous objections were timely filed by members of the Tamiami Village Lot Owners Association, Inc., the Tamiami Village Community Association, Inc., and the Tamiami Renter's Association, Inc. Consequently, the matter was set for formal hearing on February 2-3, 1995. On November 22, 1994, the Office of Public Counsel (OPC) filed a Notice of Intervention which we acknowledged by Order No. PSC-94-1475-PCO-SU, issued December 1, 1994.

The Prehearing Conference was held on January 9, 1995, in Tallahassee, Florida. At that conference, the parties and Staff identified thirteen issues to be addressed at the formal hearing and acknowledged a stipulation which is addressed in Order No. PSC-95-0138-PHO-SU, the Prehearing Order, issued January 27, 1995.

The formal hearing was held in this matter on February 2, 1995, in Fort Myers, Florida. Approximately 350 customers attended the hearing. A. A. Reeves, III, testified on behalf of the utility. Kimberly H. Dismukes testified on behalf of OPC. The testimony of Kathy L. Welch and James Grob was entered into the record on behalf of Staff.

Twenty-three residents of Tamiami Village (customers of TVU) and one resident of another subdivision (customer of NFMU) offered testimony. Several customers of TVU testified that NFMU's service availability charge is unfair because it is based on an average usage of 200 gallons per day (gpd), whereas the customers believe their average usage is less than 200 gpd. Several customers also testified that they are part-time residents of Fort Myers, and that many customers live in one-person households. Certain customers expressed concern about paying the charge while living on a fixed income. The customer of NFMU raised similar concerns.

On March 1, 1995, NFMU and OPC filed post-hearing briefs. Along with its brief, OPC filed certain proposed findings of fact and conclusions of law or policy. This matter was presented for final determination at the April 18, 1995, Agenda Conference. By Order No. PSC-95-0576-FOF-SU, issued May 9, 1995, we approved NFMU's application to transfer the territory served by TVU to NFMU, to cancel TVU's Certificate No. 332-S, and to amend NFMU's Certificate No. 247-S. Additionally, we approved NFMU's request to impose its current rates, charges, classifications, rules and regulations, and service availability policies upon the customers of TVU.

On May 24, 1995, OPC timely filed a Motion for Reconsideration and Motion for Clarification of Order No. PSC-95-0576-FOF-SU. NFMU filed a timely response to these Motions on June 6, 1995. OPC did

not request oral argument. This Order disposes of OPC's Motions for Reconsideration and for Clarification.

MOTION FOR RECONSIDERATION

By its Motion for Reconsideration, OPC requests that we reconsider our decision to impose NFMU's approved $740 service availability charge upon the customers of TVU. OPC requests that we instead approve a charge of $375, based upon actual average flow, or $518, based upon actual peak flow. Alternatively, OPC requests that we reopen the record in this proceeding, recognize our Staff as an adverse party, allow OPC to cross-examine a Staff witness in order to receive further evidence to resolve the many questions which we found unanswered, and assign an unbiased person to assist us with our deliberations.

Rule 25-22.060(1)(a), Florida Administrative Code, permits a party who is adversely affected by an order of the Commission to file a motion for reconsideration of that order. The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962). In Diamond Cab, the Florida Supreme Court declared that the purpose of a petition for reconsideration is to bring to an agency's attention a point of law or fact which it overlooked or failed to consider when it rendered its order. In Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974), the Court found that the granting of a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. We have applied this rationale in our review of OPC's Motion.

OPC raises six reasons for filing its Motion for Reconsideration. These reasons, followed by NFMU's responses to, and our analysis of, each of these reasons, are:

1. Burden of Proof

OPC contends that we erred in finding that OPC bore the burden of justifying that NFMU's service availability charges should be changed. NFMU seeks the affirmative relief in this docket. We cited to Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982), in finding that OPC has the burden of proof in this docket. The Court found that the "[b]urden of proof in a [C]ommission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates." (Id.) NFMU seeks to change the rates and charges that are currently being charged to these customers. OPC requests that we reconsider our Order, and find that the burden of proving the reasonableness of

NFMU's proposed charges rests with NFMU, not with OPC to prove them unreasonable.

NFMU responds, and we agree, that we correctly placed the burden on NFMU to prove the reasonableness of imposing its rates and charges upon the customers of TVU, and on OPC to justify that NFMU's service availability charges should be changed for mobile home customers. NFMU has not sought to change its rates and charges in this docket. Rather, NFMU seeks to apply its approved rates and charges to new customers. Since NFMU has an established service availability charge for mobile home customers, the burden was on OPC to prove that the established charge is inappropriate. The Court's directive in Cresse on this point is clear. (Id.) In making its conclusions of law with respect to the placement of burdens of proof, we correctly applied that directive. Accordingly, OPC's request for reconsideration on this point is hereby denied.

2. Due Process

OPC contends that we violated OPC's due process rights by not allowing OPC to call a Staff witness in this proceeding, by relying on Staff in making our deliberations, and by relying on evidence not in the record.

OPC argues that by Order No. PSC-95-0137-PCO-SU, issued January 27, 1995, in this docket, the prehearing officer violated OPC's due process rights by granting Staff's Motion for a Protective Order and by quashing OPC's subpoena of a Staff witness. NFMU responds, among other things, that the time for requesting reconsideration of Order No. PSC-95-0137-PCO-SU has long since passed. We agree. OPC has missed its opportunity to request reconsideration of Order No. PSC-95-0137-PCO-SU. Pursuant to Rule 25-22.038(2), Florida Administrative Code, absent good cause shown, OPC had ten days from the date of service of that Order within which to seek reconsideration. OPC has not shown cause as to why we should reconsider any portion of that Order at this late date. In accordance with Rule 25-22.038(2), Florida Administrative Code, we find that OPC has waived its right to request reconsideration of Order No. PSC-95-0137-PCO-SU.

OPC also argues that Staff acted as an advocate for the utility in this case, as evidenced by Staff's adversarial cross-examination of OPC's witness as compared to its friendly cross-examination of NFMU's witness. According to OPC, by allowing Staff to participate ex parte in our deliberations, we violated OPC's due process rights.

NFMU responds that the participation of Staff in this proceeding was entirely appropriate. Staff articulated its positions at the prehearing conference. Because it is logical to assume that Staff's cross-examination will emulate its positions, OPC should not have been surprised by the nature of Staff's cross-examination of the witnesses at hearing. If OPC believed there was reason to prohibit Staff from taking a position on the issues, it should have raised that objection at the appropriate time. Now is too late.

We agree with NFMU that Staff appropriately participated in this proceeding. See South Fla. Natural Gas Co. v. PSC, 534 So. 2d 695, 697-98 (Fla. 1988). We additionally note that the recent holding of the Florida Supreme Court in Cherry Communications, Inc. v. Deason, 652 So. 2d 803, 805 (Fla. 1995), is inapplicable to the proceedings in this docket. The Cherry Court narrowly held that it is a violation of the due process clause of our state constitution for this Commission to permit the same Staff counsel who acts as prosecutor in a license revocation proceeding to later participate in deliberations. Staff counsel did not act as a prosecutor in the instant case. We did not violate OPC's due process rights by permitting Staff to participate in our deliberations. Moreover, Rule 25-22.026(3), Florida Administrative Code, allows Staff to participate as a party in any proceeding in order to represent the public interest, not to act as an advocate for one side or the other. Accordingly, Staff represented the public interest in this proceeding, not as an advocate for the utility. For these reasons, OPC's alternative request for this Commission to reopen the record, recognize Staff as an adverse party, allow OPC to cross-examine a Staff witness, and assign an "unbiased" person to assist in deliberations, is hereby denied.

Finally, OPC argues that we also violated OPC's due process rights by relying on Staff's characterization of NFMU's level of contributions-in-aid-of-construction (CIAC) as being within the range required by Rule 25-30.580, Florida Administrative Code, without providing OPC the opportunity to challenge this presumption. Exhibit 34 was not entered into the record. Therefore, according to OPC, we grossly abused our discretion by using information and calculations from Exhibit 34 to determine that NFMU's CIAC level accords with the Rule. OPC requests that we remove from the Order any reference to NFMU's CIAC level as being within the range provided by the Rule.

NFMU responds, and we agree, that we did not use any information or calculations from Exhibit 34, which is not in evidence. We based our findings regarding NFMU's CIAC level upon Exhibit 36, which is NFMU's 1993 annual report, and which was

admitted into evidence without objection. At page 20 of the Order, we state that "[u]sing the information contained in the utility's 1993 annual report and the current service availability charges, we calculate that the utility is at a 74.65% contribution level." Because this finding is supported by the record, OPC's request that we remove all reference to this finding from Order No. PSC-95-0576-FOF-SU, is hereby denied.

3. Errors of Fact

OPC points out that Order No. PSC-95-0576-FOF-SU contains certain errors of fact. At page 2 of the Order, NFMU is identified as a Class B utility, when in fact it is a Class A utility. Also at page 2 of the Order, we state that NFMU's 1993 annual report indicates that NFMU has an annual operating revenue of $687,000 and a net operating deficit of $204,000. These two figures are incorrect, as they reflect the amounts reported for 1992, not 1993. The correct amounts for 1993 are $924,000 and $150,000, respectively. According to NFMU, these factual errors are irrelevant to our ruling and therefore need not be corrected on reconsideration. We agree with OPC that these errors were made. Therefore, we find it appropriate to grant OPC's request for correction of these errors. Order No. PSC-95-0576-FOF-SU is hereby amended accordingly, to correct these errors for informational purposes. We note, however, that these errors were contained in the Background section of the Order only, and do not affect the substance of our decisions to approve the transfer and the limited proceeding. The first paragraph in the Background section of Order No. PSC-95-0576-FOF-SU shall be stricken, and the following paragraph shall be inserted in its place:

> North Fort Myers Utility, Inc. (NFMU or utility), is a Class A utility which provides regional wastewater service to approximately 2,700 customers in northern Lee County. The utility's 1993 annual report indicates an annual operating revenue of $924,000 and a net operating deficit of $150,000.

4. Failure to Consider Critical Contradicting Evidence

OPC argues that we failed to consider the testimony of Mr. Reeves in finding that NFMU's level of CIAC was within the range provided for by Rule 25-30.580, Florida Administrative Code. Mr. Reeves testified that with respect to Exhibit 34, which showed NFMU's CIAC level to be at 74.65%, he did not know what assumptions were made to arrive at that figure. Again we note that Exhibit 34 is not in the record. Mr. Reeves was unable to sponsor the exhibit, and it was not offered into evidence. Again we also note

that at page 20 of the Order, we state that "[u]sing the information contained in the utility's 1993 annual report and the current service availability charges, we calculate that the utility is at a 74.65% contribution level." Because this finding is supported by the record, OPC's request for reconsideration on this point is hereby denied.

OPC further argues that we failed to consider that Rule 25-30.055(1)(a), Florida Administrative Code, does not apply to utilities the size of NFMU, and that we erred in using this Rule to judge the reasonableness of the 200 gpd assumption upon which NFMU's mobile home service availability charge is based.

NFMU responds that this argument is inappropriate for rehearing. Further, according to NFMU, we clearly recognized that this Rule was not the basis for our decision by finding at page 24 of the Order "that the existing gallonage level is reasonable as compared to what we may have required based on Rule 25-30.055(1)(a), Florida Administrative Code."

OPC argued this point both at the hearing and in its Post Hearing Brief. It is inappropriate for OPC to reargue it here. A motion for reconsideration should not be used as a procedure for reargument. Diamond Cab Co. of Miami, 146 So. 2d at 891. Moreover, NFMU is correct that we did not base our decision upon Rule 25-30.055(1)(a), Florida Administrative Code. Our decision was based upon the entire record in this proceeding. Accordingly, OPC's request for reconsideration on this point is hereby denied.

5. Misapprehension of Fact

OPC notes that at page 19 of the Order, we found that the record does not indicate whether NFMU's 1987 plant expansions were contemplated in its original service availability case. OPC attaches as Exhibit A to its Motion certain documents which show that NFMU's 1987 plant expansions were not included in the calculation of its initial service availability charge. OPC requests that we reconsider the Order and find that circumstances have changed since NFMU first calculated its service availability charges.

NFMU points out that OPC's Exhibit A is not in the record. We therefore did not err in finding that the record does not indicate whether the 1987 plant expansions were contemplated when NFMU's original service availability charge was established.

OPC essentially requests that we go outside of the record in order to make a new finding. This we decline to do. Accordingly, OPC's request for reconsideration on this point is hereby denied.

6. The Order is Inconsistent, Arbitrary, and Not Based upon Competent and Substantial Evidence

OPC argues that we arbitrarily found NFMU's service availability charges to be reasonable. OPC further argues that the Order is not consistent with the facts of the case and is inconsistent with a prior decision of the Commission.

OPC argues that we cannot legally find NFMU's charges to be reasonable if we do not know whether a key component of the charge, the 275 gpd, represents a peak or average flow. Further, OPC believes that if the 275 gpd number happens to be an average number and the 200 gpd number used for mobile home customers happens to be a peak number, the charge calculated for the mobile home customers would be discriminatory.

NFMU argues that the question of whether the 275 gpd figure is based upon peak or average flow is irrelevant. This issue would only have been relevant had we determined that we should depart from our previous decisions in the Forest Park, Carriage Village, and Lake Arrowhead cases.

We do not believe that we erred by finding NFMU's charges to be reasonable, despite that we also found at page 16 of the Order that "nothing in the record conclusively resolves whether the 275 gpd used to establish the utility's service availability charge is based upon peak or average flow." At page 20 of the Order, we found that "the 275 gpd was appropriately reviewed and established in the utility's initial service availability case. That case established 275 gpd as one equivalent residential connection (ERC). There is no reliable data in the record which shows that the 275 gpd level is incorrect." Accordingly, OPC's request for reconsideration on this point is hereby denied.

OPC further argues that the Order is not based upon competent and substantial evidence, as the 200 gpd assumption used to calculate NFMU's service availability charge is based upon an irrelevant and inoperative HRS rule. NFMU responds, and we agree, that this is mere reargument of OPC's Post Hearing Brief. Moreover, NFMU points out that, in Conclusions of Law 6 and 7, we concluded that the HRS rule does not apply to systems the size of NFMU, and that we are not bound by that rule. We did not base our decision upon the HRS rule. Therefore, OPC's request for reconsideration on this point is hereby denied.

Finally, OPC contends that the Order is inconsistent with Order No. 19857, issued August 22, 1988, in Docket No. 871044-WU, because we found, at page 15, that "Rules 25-22.0408, 25-30.135, and 25-30.565, Florida Administrative Code, concern a full service availability case which was not required for the approval of a mobile home charge." By Order No. 19857, issued in a similar transfer proceeding in which the purchasing utility requested to impose its then current service availability charges on the customers of the selling utility, the Commission found that Section 367.101, Florida Statutes, and Rule 25-30.565, Florida Administrative Code, were indeed applicable.

NFMU responds that the Commission's decision in Order No. 19857 is easily differentiated from the instant case. Although Order No. 19857 involved a transfer proceeding, it did not involve a limited proceeding. The system being acquired which was the subject of Order No. 19857 was not being interconnected with the system of the acquiring utility, as is the case in the instant proceeding. Moreover, the system in Order No. 19857 was overcontributed, whereas that is not the case here.

We agree with NFMU. The Commission's decision in Order No. 19857 is indeed distinguishable from the instant case. By Order No. 19857, the Commission required the acquiring utility to meet the requirements of Section 367.101, Florida Statutes and Rule 25-30.565, Florida Administrative Code, because the acquiring utility requested to change the existing service availability charges of the system which was being acquired, and which was to continue in operation. NFMU, on the other hand, does not seek to change its service availability charges here. NFMU met the requirements of Section 367.101, Florida Statutes, and Rules 25-22.0408, 25-30.135, and 25-30.565, Florida Administrative Code, in its initial service availability case in 1981. It would be duplicative for us to require NFMU to follow these rules again in order to acquire the TVU system. Therefore, we did not err by finding it unnecessary for NFMU to follow these rules. Accordingly, OPC's request for reconsideration on this point is hereby denied.

For all of the foregoing reasons, OPC's Motion for Reconsideration of Order No. PSC-95-0576-FOF-SU is hereby granted in part and denied in part. The Motion is granted in part, and Order No. PSC-95-0576-FOF-SU is hereby amended, to correct certain errors of fact contained in the Background of the Order, as specified above. Order No. PSC-95-0576-FOF-SU is hereby corrected to reflect that NFMU is a Class A utility, that its 1993 operating revenue is $924,000, and that its 1993 net operating deficit is $150,000. Because our final decision to approve NFMU's request to impose its approved service availability charge upon the customers

of TVU is supported by the record in this case, OPC's Motion for Reconsideration is otherwise denied, and Order No. PSC-95-0576-FOF-SU is hereby reaffirmed in all other respects.

MOTION FOR CLARIFICATION

OPC requests clarification of our decision to reject OPC's proposed conclusion of law that "NFMU has the burden to provide competent and substantial evidence to justify the reasonableness of its charges, including the subject service availability charges for its mobile home customers." According to OPC, rejection of that proposed conclusion is inconsistent with our Conclusion of Law number 4, at page 30, that "[a]s the applicant in this case, the burden of proof rests upon [NFMU] to prove that the proposed transfer is in the public interest, and to prove the reasonableness of imposing its approved rates and charges upon the customers of [TVU]."

NFMU responds that our decision to reject OPC's proposed conclusion of law is not inconsistent with Conclusion of Law number 4. We agree. OPC's proposed conclusion incorrectly places the burden of proving the reasonableness of the amount of the service availability charge upon NFMU. Instead, we correctly concluded that NFMU had the burden of proving the reasonableness of imposing its rates and charges upon the TVU customers. The amount of the charges had already been established in prior Commission orders. Therefore, we also correctly concluded, in Conclusion of Law number 5, that "[a]s the party seeking to change an approved rate, the burden of proof rests upon [OPC] to justify that [NFMU's] established service availability charges should be changed." Id. We find that Conclusion of Law number 4 is clear. Therefore, OPC's Motion for Clarification is hereby denied.

Because no further action is necessary, this docket shall be closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion for Reconsideration of Order No. PSC-95-0576-FOF-SU is hereby granted in part and denied in part, as set forth in the body of this Order. It is further

ORDERED that Order No. PSC-95-0576-FOF-SU is hereby amended as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's Motion for Clarification is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 8th day of August, 1995.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF 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 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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.