BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment of Certificate No. 247-S to extend service area by the transfer of Buccaneer Estates in Lee County to North Fort Myers Utility, Inc.	DOCKET NO. 981781-SU ORDER NO. PSC-99-1463-FOF-SU ISSUED: July 27, 1999

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS

ORDER DENYING MOTION FOR RECONSIDERATION AND NOTICE OF ADDITIONAL AUTHORITY

BACKGROUND

North Fort Myers Utility, Inc. (NFMU or utility) is a Class A utility located in Lee County which provides only wastewater service. According to its 1997 annual report, the utility has 5,753 wastewater customers and reported operating revenues of $1,958,553 and a net loss of $598,220.

On or about August 24, 1998, NFMU executed a Developer Agreement with the owners of Buccaneer Mobile Estates, MHC-DeANZA Financial Limited Partnership (Park Owner) and Buccaneer Utility (Buccaneer). This Developer Agreement was filed with this Commission on September 4, 1998, and deemed approved on October 4, 1998 pursuant to Rule 25-30.550, Florida Administrative Code.

Buccaneer consists of 971 manufactured home sites which had previously received wastewater service from the Park Owner as part of the lot rental amount. Pursuant to a letter dated May 14, 1976 from the Commission, the provision of service in this manner rendered the wastewater utility system exempt from regulation in accordance with Section 367.022(5), Florida Statutes.

Water service to Buccaneer is provided by Buccaneer Water Service, a Commission-regulated utility. The water utility purchases its water from Lee County Utilities, and therefore, does

not have a water treatment plant. All tenants are charged metered rates for water, pursuant to Order No. PSC-96-1466-FOF-WU, issued December 3, 1996, in Docket No. 960133-WU.

On November 23, 1998, Buccaneer's existing wastewater permit expired. NFMU connected to Buccaneer on November 24, 1998. On December 1, 1998, NFMU filed an Application for Amendment to Certificate of Authorization to include the wastewater service area of Buccaneer. On December 7, 1998, NFMU filed an Emergency Motion to Implement Rates and Charges with respect to the interconnection of existing wastewater customers within the Buccaneer Estates mobile home community to NFMU. On December 9, 1998, NFMU responded to a staff request for additional information on the connection of Buccaneer, with a letter referencing various parts of Chapter 723, Florida Statutes.

On December 10, 1998, NFMU mailed the notice to the Buccaneer customers which stated that utility service had been assigned to NFMU, that connection fees would be collected, and that effective December 1, 1998, the utility would begin billing for monthly service and the lot rent would decrease by a specific amount.

On December 18, 1998, numerous customer protests concerning the application of NFMU's monthly rates and connection fees were received by this Commission.

On December 21, 1998, the Office of Public Counsel (OPC) filed a Response to the Emergency Motion to Implement Rates and Charges. On January 14, 1999, OPC filed a Notice of Intervention pursuant to Section 350.0611, Florida Statutes, which was acknowledged by Order No. PSC-99-0180-PCO-SU, issued January 29, 1999. By Order No. PSC-99-0420-PCO-SU, issued March 1, 1999, the matter was set for an administrative hearing on September 14 and 15, 1999.

At the February 16, 1999 Agenda Conference, we considered whether a show cause proceeding should be initiated with respect to the utility's interconnection of Buccaneer without prior Commission approval, and the request to collect rates and charges by NFMU from Buccaneer customers, pending the outcome of the hearing. Counsel for NFMU and OPC addressed the Commission. By Order No. PSC-99-0492-SC-SU, on March 9, 1999, we ordered NFMU to show cause, in writing, within 21 days, why it should not be fined $5,000 for an apparent violation of Section 367.045(2), Florida Statutes, for the failure to obtain our approval prior to serving territory outside

of its certificate. We also denied NFMU's Emergency Motion to Implement Rates and Charges.

On March 10, 1999, NFMU filed a Motion for Reconsideration of Order No. PSC-99-0492-SC-SU. A Request for Oral Argument was filed by NFMU on March 17, 1999. On March 22, 1999, OPC filed a response to NFMU's Motion for Reconsideration. On that same date, an Objection to NFMU's Motion for Reconsideration was filed by Mr. Donald Gill, a resident of Buccaneer Estates who had also filed a letter with this Commission on December 18, 1999, objecting to NFMU's amendment application. On April 14, 1999, NFMU filed a Notice of Additional Authority, in support of its Motion for Reconsideration.

REQUEST FOR ORAL ARGUMENT

In its Request for Oral Argument, NFMU states that "since the legal issue raised in the Motion was not addressed at the prior agenda conference, NFMU believes that it would be beneficial to the Commission to hear Oral Argument." NFMU is only requesting reconsideration of the decision to deny NFMU the right to collect monthly rates on an interim basis.

In its response, OPC notes that NFMU's Request for Oral Argument was filed on March 17, 1999, which was seven days after NFMU's Motion for Reconsideration was filed. OPC states that Rule 25-22.058(1), Florida Administrative Code, provides that "a request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested." Further, OPC states that the rule provides that the failure to file a timely request for oral argument shall constitute waiver thereof. Finally, OPC argues that this Commission, in its discretion, should not grant oral argument because all of the arguments raised in the motion for reconsideration have already been argued and considered before Order No. PSC-99-0492-SC-SU was issued.

This matter has not yet been to hearing. Therefore, interested persons were permitted to participate in the disposition of this item at the July 6, 1999 agenda conference, and counsel for NFMU and OPC were provided with the opportunity to address the Commission and answer any questions. Under these circumstances, we find that it is not necessary to rule on NFMU's Request for Oral Argument on its Motion for Reconsideration, and we hereby decline to do so.

MOTION FOR RECONSIDERATION

In its Motion for Reconsideration, NFMU states that it only seeks reconsideration of our decision to deny NFMU the right to collect monthly rates on an interim basis. NFMU notes that, by Order No. PSC-99-0492-SC-SU, we concluded that the mobile home park owner had the obligation to provide wastewater service to the residents of Buccaneer Estates, and that NFMU could negotiate an arrangement with the park owner and file a revised tariff reflecting that arrangement. The Motion for Reconsideration states that, in making that conclusion, we misinterpreted Chapter 723, Florida Statutes.

NFMU contends that the notice provided to mobile home park residents pursuant to Section 723.037, Florida Statutes, implements the wastewater agreement between NFMU and the mobile home park owner. NFMU states that because the utility believed the mobile home park was within its service territory, the agreement did not provide for any regulatory approval contingencies. Therefore, NFMU states that there is a valid, binding contract by which NFMU is obligated to provide service, and that NFMU has no lawful mechanism to require the mobile home park owner to pay for the wastewater service currently provided to the residents by NFMU.

In its Motion, NFMU states that the utility has admitted its mistake in believing Buccaneer Estates was within its certificated service area. Further, the utility believes that this mistake is understandable in light of the fact that all other areas within NFMU's certificated territory which were excluded from its service area were Commission-certificated utilities. NFMU states that the issue is whether NFMU should "'pay' for that mistake by having to give free wastewater service to the residents of Buccaneer Estates during the pendency of this proceeding." Motion for Reconsideration at pp. 2-3.

NFMU also states in its Motion that until the instant docket, this Commission has never required a utility to provide service to customers outside the utility's service area without compensation during an amendment proceeding to include those customers in the utility's service area. In support thereof, NFMU cites to Order No. PSC-95-0624-FOF-WU, issued May 22, 1995, in Docket No. 930892-WU (In Re: Application for Amendment of Certificate No. 488-W in Marion County by Venture Associates Utility Corp.), which was raised and discussed at the February 16, 1999 agenda conference. NFMU argues that only in the Venture case have we required revenues

collected under such circumstances to be collected subject to refund.

Finally, NFMU states in its Motion that "recent appellate court decisions since the Venture Associates case has added support to the practical solution of allowing a utility to collect rates subject to refund -- that is, mandating surcharges." However, no citation to such cases is provided in NFMU's Motion for Reconsideration.

In its Response, OPC states that the purpose of a motion for reconsideration is to bring to the attention of the Commission a point of fact or law which was overlooked or which the agency failed to consider when it rendered its decision. Further, a motion for reconsideration is not intended to be an opportunity to reargue the case merely because the losing party disagrees with the judgment.

OPC contends that NFMU is in error as to NFMU's suggestion that we misunderstood Chapter 723, Florida Statutes. First, OPC points out that NFMU failed to discuss in its Motion for Reconsideration the mobile home park owner's obligations under the lease agreements, while suggesting that we may have misunderstood the requirements of Section 723.037, Florida Statutes. As discussed previously, that section provides that the park owner may give written notice prior to any increase in lot rental amount or reduction in services or utilities. OPC argues that a reduction in service is not necessarily a right to cease providing service. OPC argues that until the dispute between the mobile home park residents and Buccaneer Estates is resolved in the circuit court, Section 723.037 does not entitle the park owner to abrogate his legal obligation to provide wastewater service to the residents.

In its Response, OPC states that NFMU's Motion for Reconsideration merely reargues the same position which was heard and rejected at the February 16, 1999 agenda conference. OPC states that NFMU reargues its position that its mistake in believing Buccaneer Estates to be a part of the utility's service territory was understandable in light of the fact that all other excluded areas in the vicinity were Commission-certificated utilities.

OPC further contends that NFMU reargues its position that, in the past, we have never required a utility to provide services to customers without compensation during the pendency of an amendment

proceeding. OPC contends that this is not the case in the instant docket, either, because Order No. PSC-99-0492-SC-SU suggests that NFMU look to the park owner to pay its bulk rate, or whatever is fair and reasonable, to provide the service. With respect to the Venture decision, referenced in NFMU's Motion, OPC states that we correctly concluded that the facts of that case differ from those in the instant docket, and that the utility should seek compensation from the party with whom it contracted to provide service, during the pendency of this case.

Finally, OPC addresses NFMU's argument that the failure to authorize collection of rates subject to refund during the pendency of the case could result in the utility's seeking a surcharge from the residents. OPC notes that NFMU fails to cite to any specific cases in support of this contention in its Motion for Reconsideration; instead, the utility makes a blanket statement that recent appellate court decisions have mandated that surcharges be paid by residents.

Although styled as an objection to NFMU's Motion for Reconsideration, the document filed by Mr. Donald Gill, who is a party to this docket, is in the nature of a response to NFMU's motion. Mr. Gill argues that NFMU's mistaken belief that Buccaneer Estates mobile home park was within its certified service area should not allow NFMU a basis for relief at the expense of the homeowners of Buccaneer Estates. Mr. Gill also states that we did not misinterpret Section 723.037, Florida Statutes, in not authorizing connection or pass-through charges, since NFMU failed to indicate which governmental agency had mandated the interconnection between NFMU and Buccaneer Estates. Mr. Gill further argues that if there is a binding contract by which NFMU is obligated to provide wastewater service to the mobile home park residents, the resolution of the obligations under the contract "rests in the jurisdiction of the circuit court and not with a regulatory agency." Finally, Mr. Gill distinguishes our ruling in Order No. PSC-95-0624-FOF-WU (Venture) from the instant docket, stating that NFMU is seeking to charge its rates to customers with an established history of having their wastewater service charges included in their rent, whereas the Venture case concerned the application of rates in a new development built by a company affiliated with the utility. Finally, Mr. Gill alleges that NFMU is unlawfully attempting to acquire the Buccaneer Estates service territory, and that the utility should not be rewarded "for its illicit acts."

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 purpose of a motion for reconsideration is to point out some matter of law or fact which we failed to consider or overlooked in its prior decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingtree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). A motion for reconsideration is not an appropriate vehicle for mere reargument or to introduce evidence or arguments which were not previously considered. 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.

NFMU argues that a mistake of fact or law was made in that we misinterpreted the requirements of Chapter 723, Florida Statutes. In their respective responses to NFMU's Motion for Reconsideration, OPC and Mr. Gill state that we have not misinterpreted Chapter 723, Florida Statutes.

Section 723.037, Florida Statutes, sets forth the noticing requirements with which a mobile home park owner must comply prior to increasing the lot rental amount or reducing utility services provided by the owner. NFMU has not explained, however, how Section 723.037, Florida Statutes, requires a different result than that ordered by this Commission, in light of the finding in Order No. PSC-99-0492-SC-SU that NFMU interconnected with the park without our approval and that the legal obligation to serve the residents remains with the owner. The Order further provided that NFMU should look to the owner to pay the bulk rate or whatever is fair and reasonable to make sure that service is provided. Contrary to NFMU's contention, the utility is not being deprived of collecting any revenue during the course of the amendment proceeding. It has the option of collecting the owner's bulk rate, or whatever is fair and reasonable, until such time as this Commission makes its determination as to whether the transfer is in the public interest. Nor does NFMU demonstrate any point of fact or law that this Commission overlooked or failed to consider which compels a different outcome.

The arguments presented in NFMU's Motion for Reconsideration were heard and considered at the February 16, 1999 agenda conference. The Motion does not demonstrate that we overlooked or failed to consider any point of fact or law in rendering our decision. NFMU's Motion for Reconsideration is therefore denied.

NOTICE OF ADDITIONAL AUTHORITY

As discussed previously, on April 14, 1999, NFMU filed a Notice of Additional Authority. Attached to its Notice was an opinion from the Florida Second District Court of Appeal, in Mihevic Corporation v. Horizon Village, Inc., 24 Fla. Law W. D 926, issued April 9, 1999. NFMU stated in its Notice that the opinion was being provided in support of NFMU's argument that the owner of Buccaneer mobile home park, having taken the steps required under Chapter 723, Florida Statutes, is not responsible for providing wastewater service to Buccaneer Estates.

With respect to NFMU's Notice of Additional Authority, we note that the Commission does not have a specific mechanism for processing the filing of a notice of additional, or supplemental, authority. However, we have stated that it might be appropriate to recognize as applicable in proceedings before the Commission the conditions for receiving supplemental authority after the last brief that are set forth in Rule 9.225, Fla.R.App.P., Notice of Supplemental Authority. Rule 9.225 provides that:

> Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument. Copies of the supplemental authorities shall be attached to the notice.

For example, in Order No. PSC-94-0987-FOF-WS, issued August 15, 1994, in Docket No. 930256-WS, In Re: Petition for Limited Proceeding to Implement Conservation Plan in Seminole County by Sanlando Utilities Corporation, we noted that a notice of supplemental authority drawing our attention to authority newly discovered and devoid of argument would be properly received.

Further, in Order No. PSC-96-1527-FOF-WS, issued December 16, 1996, in Docket No. 941121-WS, we noted that "although our rules do not provide for the filing of supplemental authority, we find that we have implicit authority to consider such. It stands to reason that if a party requesting reconsideration alleges that we overlooked some point of law, it may be necessary to consider supplemental authority on that point."

We initially note that a notice of supplemental authority is generally not filed until the hearing process is nearly concluded, after the filing of the last brief but before a decision has been rendered. Rule 9.225, Fla.R.App.P. The hearing in the instant case has not yet taken place, and is currently scheduled for September 14 and 15, 1999. Regardless of whether NFMU's Notice of Additional Authority has been raised at the appropriate time, we find that the opinion attached to NFMU's Notice is distinguishable on its face from the instant case.

Mihevic concerned a dispute which had arisen between a mobile home park owner (Horizon Village) and the mobile home park residents' association. Pursuant to Section 723.037, Florida Statutes, Horizon Village had sent a notice on September 20, 1996 to its residents that as of January 1, 1997, service would no longer be provided by Horizon Village's on-site package plant, that the cost of service would no longer be included in the rent and that service would be provided by NFMU (the applicant in the instant docket).

However, when NFMU sent its first bill in February, the bill was for services commencing on December 11, 1996, less than the statutorily required ninety days from the date the owner sent the notice. The owner testified that the utility represented that service would not begin before January 1, 1997. The utility company representative admitted discussing January 1, 1997, as the starting date with the owner, although the representative apparently knew the service was likely to begin before that date.

Based on these circumstances, the trial court determined the notice was invalid and the owner was held liable to repay substantial amounts of money to the residents. The appellate court found, however, that it was the actions of NFMU which caused the service to begin before the notice's ninety-day period had expired. The appellate court reversed the trial court's determination that the notice was thus invalid.

The Mihevic opinion concerns a civil court's interpretation of Section 723.037, Florida Statutes, with respect to the validity of a notice which was sent to mobile home park residents pursuant to that statute. The opinion is not factually on point regarding the circumstances present in the instant case. It is not an issue before us, nor is it within our purview, to interpret a statute from the Florida Mobile Home Act.

In submitting the court's opinion to this Commission in support of NFMU's argument in its Motion for Reconsideration, NFMU states that the opinion is appropriate additional authority in support of its argument that the owner of Buccaneer mobile home park has taken the steps required under Chapter 723, Florida Statutes; and that thus, the owner is not responsible for providing wastewater service to Buccaneer Estates. NFMU fails to address, however, the requirements of Section 367.045(2), Florida Statutes, which require that a utility obtain Commission approval prior to extending service outside its certificated territory.

The Mihevic case does not appear to be applicable to the facts in the instant case. We therefore find that the case shall not be considered as appropriate supplemental authority in support of NFMU's Motion for Reconsideration.

CLOSING DOCKET

An administrative hearing in this matter is scheduled for September 14 and 15, 1999. Therefore, this docket shall remain open pending completion of the hearing process and final disposition of the case.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that North Fort Myers Utility, Inc.'s Motion for Reconsideration of Order No. PSC-99-0492-SC-SU is denied. It is further

ORDERED that North Fort Myers Utility, Inc's Notice of Additional Authority shall not be considered as appropriate supplemental authority in support of NFMU's Motion for Reconsideration. It is further

ORDERED that this docket shall remain open pending the final disposition of this case.

By ORDER of the Florida Public Service Commission this 27th day of July, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

JSB

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.

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.