

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

ORIGINAL
RECORDS AND
REPORTING

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**NORTH FORT MYERS UTILITY, INC.'S
RESPONSE TO MOTION TO RECONSIDER AND REHEAR**

NORTH FORT MYERS UTILITY, INC., ("NFMU") by and through its undersigned attorneys and pursuant to Rule 25-22.060, Florida Administrative Code, files this Response to the Motion to Reconsider and Rehear filed by Intervenors Donald Gill and Joseph Devine.

The purpose of a motion for reconsideration is to bring to the Commission's attention a point of fact or law which was overlooked by the Commission, or which the Commission failed to consider when it rendered its order, and it is not intended as a procedure for rearguing a case merely because the losing party disagrees with the

_____ decision. *In re: Investigation of Rates of Gulf Utility Company,*
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG 2 _____
MAS 3 _____
OPC _____
RFR _____
SEC _____
WAW _____
OTH _____
_____ 97 FPSC, 12:101 (Dec. 9, 1997)¹; *Diamond Cab Company of Miami v. King*, 146 So.2d 889 (Fla. 1962).

¹Order No. PSC-97-1544-FOF-WS.

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Of particular applicability to the Motion of Mr. Gill and Mr. Devine is the holding in *Stewart Bonded Warehouse v. Bevis*, 294 So.2d 315 (Fla. 1974) that the motion for reconsideration should be based upon specific factual matters set forth in the record. In *In re: Investigation of Rates of Gulf Utility Company, supra*, this Commission adopted that portion when it reached the following conclusion which is applicable in this case:

Furthermore, Gulf inappropriately relies [in its motion for reconsideration] on Mr. Moore's Affidavit and attachment. These items go beyond the scope of reconsideration because neither is a part of the record in this case.
97 FPSC 12:104.

Rule 25-22.060(2), Florida Administrative Code, requires that a motion for reconsideration "contain a concise statement of the grounds for reconsideration". The Motion filed by Mr. Devine and Mr. Gill is anything but concise.

1. There is nothing in the record to support this statement and it would be inappropriate to consider the statement, even if it had some significance to this proceeding. Attorney Burandt testified in this proceeding (Tr. 78-86)² and Mr. Devine had an

²References are to the electronic version of the transcript. References to Mr. Reeves prefiled testimony which is not included at the electronic version will be referenced as PFT followed by the appropriate page number of Mr. Reeves prefiled testimony.

opportunity to question him on this point. He failed to do so and may not now be heard to complain. In fact, the evidence in the record is directly contrary to this assertion. The President of the Homeowners' Association testified that the Settlement Agreement was the result of negotiation between the Homeowners' Association, through Office of Public Counsel ("OPC"), and NFMU (Tr. 88).

2. There is no evidence in the record as to who prepared the Settlement Agreement signed by OPC and NFMU. Therefore, it would not be appropriate to consider it during a reconsideration. If Mr. Gill and Mr. Devine are asserting a conflict of interest by Mr. Burandt, they should have taken the opportunity to explore that issue when Mr. Burandt testified.

3. There is nothing in the record to support this assertion and it is not proper for consideration at this time. President and Board Member, Tom Gaylord, testified at the hearing (Tr. 88-89) and Mr. Devine chose not to question him or any of the other Board Members who testified regarding any special meetings.

4. Any references to purported excerpts of Homeowners' Association meetings are inappropriate. In fact, since the Association is not a party to this proceeding, such excerpts are also irrelevant.

5. There is nothing in the record as to the "will of the residents". While there is testimony from members of the Association, there is no evidence of any vote of the Association members except that of the President of the Association who testified that over 300 persons voted to accept the Settlement Agreement (Tr. 88-89). What is clear from the evidence is that Mr. Devine and Mr. Gill, along with Mr. Ludington, intimidated those residents who disagreed with their position, particularly members of the Board of the Homeowners' Association. One Board Member, almost in tears, testified:

You two gentlemen [referring to Devine and Ludington] - I'm sorry - you have called me names. You have accused me of things in the Blo Hard.³(Tr. 66-67).

6. Again, there are no facts in the record as to the "will of the residents of Buccaneer Estates" other than the testimony of Mr. Gaylord referenced in paragraph 5 hereof.

7. This statement is irrelevant. Obviously, these Intervenors complained about the Settlement Agreement because they had their own agenda; however, other than in pleadings, those complaints are not in the record.

³This is a "newsletter" written by Ludington, Devine and Gill and distributed within the park.

8. There is no evidence in the record regarding the "will of the residents". The Settlement Agreement was a binding document as to NFMU, OPC and the Association, who were signatories thereto. Not one of the signatories have attempted to state any legal basis which would allow them to withdraw from the Settlement Agreement; thus the Settlement Agreement is binding upon the Association, OPC, and NFMU. *Crown Ice Machine Leasing Company v. Senter Farms, Inc.*, 174 So.2d 614 (Fla. 2d DCA 1965).

9. The Settlement Agreement contained elements which are applicable to the "public interest" issue in this proceeding. The Settlement Agreement was not binding upon the Intervenors, but was legitimately an issue in this proceeding and was denoted as such in the Prehearing Order.⁴

10. Mr. Devine and Mr. Gill mistate what occurred at the November 16, 1999 "hearing". If any representation was made⁵ it was that the Settlement Agreement continued to be supported by the Association. As noted in paragraph 8 hereof, the Association was bound by the Settlement Agreement. There is no evidence reflecting that the Settlement Agreement, which had been signed by the Utility

⁴Commission Order No. PSC-99-1786-PHO-SU.

⁵No review of the transcript of what transpired at that "hearing" has been reviewed.

Committee and Board of the Association was not the "will of the residents". The Board acts on behalf of the members of the Association. If the Board has taken some action which Mr. Gill and Mr. Devine believe to be inappropriate, their remedy is not before this Commission.

11. NFMU agrees that the OPC did not represent the Association in this proceeding. In fact, that is the reason why OPC could continue to support the Settlement Agreement even though the Association purported to withdraw from it.

12. NFMU agrees the Association was not a party of record in this proceeding, which has no legal significance to the Motion.

13. Whether or not this occurred is totally outside of the record. Further, it is irrelevant to this proceeding.

14. The record reflects that Attorney Burandt represents the Association in a civil proceeding against the park owner (Tr. 78-86), and that he did not file an appearance in this proceeding.

15. This purported quote from the Final Order is inaccurate. Further, their reference to "section 7" is inappropriate.

16. OPC represents the customers of a utility system, except those who choose to represent themselves, such as the Intervenors.

17. Mr. Gill and Mr. Devine, with the exception of an apostrophe, accurately quote from the Final Order.

18. When and whether OPC's brief reached the Intervenors is irrelevant. It was served in accordance with Commission Rules.

19. Mr. Gill and Mr. Devine fail to point out the derivation of the "timely notice" policy which they contend is violated. What kind of timely notice was NFMU given of the Association's change in position at the final hearing? In fact, OPC never reversed its position in this proceeding. The OPC has fully supported the Settlement Agreement during this entire proceeding. When the Association at the final hearing purported to withdraw its support of the Settlement Agreement, OPC did not attempt to withdraw from it. Mr. Shreve stated at the final hearing:

Commissioner, Mr. Friedman is correct. We signed the Settlement Agreement. Our name is still on there. We are not changing anything there. But I wanted to make you, Mr. Friedman and everyone also aware of the instructions or the change in instructions that I have had from that customer group. (Tr. 55).

20. The statement made by Mr. Shreve should not have been misinterpreted by Intervenors as meaning that OPC was attempting to withdraw from the Settlement Agreement. In fact, there was no legal basis for it to do so. *Crown Ice Machine Leasing Company v. Senter Farms, Inc., supra.*

21. As stated previously, there has been no change in OPC's position throughout this proceeding as to the Settlement Agreement. See paragraphs 19 and 20 above.

22. As stated previously, there has been no change in OPC's position throughout this proceeding as to the Settlement Agreement. See paragraphs 19 and 20 above.

23. As stated previously, there has been no change in OPC's position throughout this proceeding as to the Settlement Agreement. See paragraphs 19 and 20 above. In addition, assuming a party could change their position, there is no requirement that such change be communicated to other parties outside of pleadings.

24. As stated previously, there has been no change in OPC's position throughout this proceeding as to the Settlement Agreement. See paragraphs 19 and 20 above.

25. The Settlement Agreement was not "resurrected"; and was always an issue properly considered by the Commission. Further, this assertion is duplicative of paragraph 9.

26. In fact, the Board of the Association does support the Settlement Agreement. As discussed many times previously, the Association could not withdraw from the Settlement Agreement. NFMU is unaware of any statement by OPC that the members of the Association were in favor of the Settlement Agreement.

27. In fact, the Board of the Association does support the Settlement Agreement. As discussed many times previously, the Association could not withdraw from the Settlement Agreement. NFMU is unaware of any statement by the Staff that the members of the Association were in favor of the Settlement Agreement.

28. In fact, the Board of the Association does support the Settlement Agreement. As discussed many times previously, the Association could not withdraw from the Settlement Agreement. NFMU is unaware of any statement by Attorney Friedman that the members of the Association were in favor of the Settlement Agreement.

29. There is no evidence in the record that the Settlement Agreement was not properly ratified by the membership of the Association. In fact, there is some testimony to the contrary (Tr. 88-89).

30. There is no evidence in the record to support this assertion. Further, it is not within this Commission's jurisdiction to address that issue when it has not been identified in the Prehearing Order.

31. There is no evidence in the record regarding a vote by the members of the Association at an August 26, 1999 meeting, which was almost two months before the final hearing. OPC and Staff are justified in not believing anything Ludington told them.

32. This is the third time which the Motion makes the identical assertion. NFMU incorporates its responses to paragraphs 9 and 25.

33. The Board of the Association has the inherent authority to act on behalf of the Association.

34. The Final Order which incorporates the Settlement Agreement is applicable to all residents of Buccaneer Estates including the Intervenors. The Final Order violates none of their federal or state guaranteed civil rights.

35. This absurd assertion does not merit any response.

36. While the Association may have purported to withdraw from the Settlement Agreement, that does not mean they were allowed to do so. As discussed many times previously, a party to a settlement agreement may not withdraw without a legal basis to do so. No such legal basis has been asserted by the Association. In fact, it is unclear as to whether the Homeowners' Association really wanted to withdraw from the Settlement Agreement even at the time of the final hearing or whether it was just trying to get a better deal at the last minute while continuing to want the benefits of the Settlement Agreement if the Ludington proposal was not accepted. The Homeowners' Association's attorney testified:

Obviously, we would all rather see you agree with us and go with Mr. Ludington's proposal instructing North Fort Myers Utility to bill MHC or its affiliates directly. That's obviously our first choice.

If we can't have that, then we'll back up to our second choice, which was the agreement that the Public Service - that the Office of Public Counsel signed with North Fort Myers Utility (Tr. 80).

37. The Association could not withdraw from the Settlement Agreement, and even if it had done so, it would not affect the validity of the Settlement Agreement as to OPC and NFMU.

38. There is no evidence that OPC, Staff and Friedman had notice of the reversal of the Board's position prior to the November 16, 1999 agenda conference. That "reversal" had no affect since the Association had never legally withdrawn from the Settlement Agreement.

39. The Board acted with apparent authority and it is not this Commission's duty to investigate the Board's authority.

40. It is ludicrous to assert that OPC violated the Intervenor's federal and state constitutional rights to due process. Intervenors chose to represent themselves in this proceeding instead of relying upon OPC to represent them. That was their decision and they cannot now complain that OPC did not share

information with them when Intervenors took positions contrary to those asserted by OPC.

41. This is basically a reargument of those arguments raised in paragraphs 19 and 21 and NFMU incorporates herein its responses to those paragraphs.

42. Only the individual Commissioners know what information influenced their decision. One would hope that the Commissioners were influenced by the fact that there was no legal basis for the Association to withdraw from the Settlement Agreement.

43. Nothing argued by Mr. Gill and Mr. Devine in their Motion legally supports this Commission to reconsider the Final Order. The whole basis of the Motion appears to be that the Association withdrew its support for the Settlement Agreement at the final hearing, and then later supported the Settlement Agreement. It would not make any difference if the Association changed its mind a dozen times. The purported withdrawal from the Settlement Agreement by the Association was ineffective and thus all actions subsequent thereto are meaningless.

What is abundantly clear from the Motion to Reconsider and Rehear is that Mr. Gill and Mr. Devine attempt to interject "facts" that are of questionable veracity and that are not within the

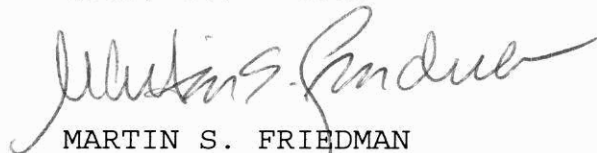
record. Consideration of such "facts" is inappropriate. *Gulf Utility Company, supra.*

Mr. Devine and Mr. Gill in their Motion have also requested oral argument. Pursuant to Rule 25-22.058(1), Florida Administrative Code, a request for oral argument shall be contained on a separate document and shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. The request for oral argument of Mr. Devine and Mr. Gill fails both of these requirements.

WHEREFORE, NFMU requests the Motion to Reconsider and Rehear be denied, and that the request for oral argument also be denied.

Respectfully submitted on this
28th day of December, 1999, by:

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For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Motion to Reconsider and Rehear was forwarded via U.S. Mail to Steve Reilly, Esquire, Office Of Public Counsel, 111 West Madison Street, Suite 812, Tallahassee, FL 32301-1906, Jennifer Brubaker, Esquire, Florida Public Service Commission, Legal Division, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850, Ronald Ludington, 509 Avanti Way, North Fort Myers, FL 33917, Donald Gill, 674 Brigantine Boulevard, North Fort Myers, FL 33917 and Joseph Devine, 688 Brigantine Boulevard, North Fort Myers, FL 33917 on this 28th day of December, 1999.


MARTIN S. FRIEDMAN

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