

M E M O R A N D U M

October 16, 1989

TO : DIVISION OF RECORDS AND REPORTING
FROM : DIVISION OF LEGAL SERVICES (SWIM, BIRCHFIELD) ^{DS} *District MAB*
RE : DOCKET NO. 891020-WS - COMPLAINTS OF VILANO VENTURE,
INC. AGAINST NORTH BEACH UTILITIES, INC. IN ST. JOHNS
COUNTY FOR FAILURE TO COMPLY WITH FPSC RULES AND
REGULATIONS

----- 22055
Attached is an Order Denying Motion to Dismiss, Granting
In Part and Denying in Part Motion to Strike Portions of the
Complaint, and Consolidating this Docket with Docket No.
891120 WS in the above-referenced docket, consisting of -6
pages, which is ready to be issued.

MAB/dlc

cc: Division of Water and Sewer

DOCUMENT NUMBER-DATE

10198 OCT 16 1989

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaints of VILANO VENTURE,) DOCKET NO. 891120-WS
Inc. against NORTH BEACH UTILITIES, INC.) ORDER NO. 22055
in St. Johns County for failure to) ISSUED: 10-13-89
comply with FPSC rules and regulations)

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

ORDER DENYING MOTION TO DISMISS, GRANTING IN PART
AND DENYING IN PART MOTION TO STRIKE PORTIONS
OF THE COMPLAINT, AND CONSOLIDATING
THIS DOCKET WITH DOCKET NO. 891120-WS

BY THE COMMISSION:

On July 24, 1989, Vilano Ventures, Inc. (Vilano or developer) filed two complaints against North Beach Utilities, Inc. (North Beach or utility). The first complaint, the "Water Complaint", addresses improvements to the water system mandated by Order No. 19093, issued April 4, 1988, and quality of service requirements. The second complaint, the "Agreement Complaint", addresses the propriety of service availability charges in an October 26, 1986 agreement which is presently being reviewed by this Commission in Docket No. 891120-WS - Request by North Beach Utilities, Inc. for Approval of Special Service Availability Contract with Vilano Venture, Inc. The charges at issue are being collected by the utility.

On August 25, 1989, North Beach filed a Motion to Dismiss Complaint and a Motion to Strike Portions of Complaint. On September 5, 1989, Vilano filed a Memorandum in Opposition to Motion to Dismiss and Memorandum in Response to Motion to Strike Portions of the Complaint.

DOCUMENT NUMBER-DATE

10198 OCT 16 1989

FPSC-RECORDS/REPORTING

MOTION TO DISMISS

The Motion to Dismiss asserts that this Commission does not have jurisdiction to determine the Agreement Complaint because this Commission has not yet acted on the utility's request that the subject agreement be considered a special service availability contract. The utility also asserts that, given an opportunity, it will demonstrate that the agreement is such a contract in that it involves expenditures which specifically benefit the development project of Vilano. The utility further alleges that little or no dispute would remain between the parties if said agreement is approved as a special service availability contract. Finally, the utility alleges that no irreparable harm would result from dismissal of the complaint pending resolution of the special service availability agreement question since both the utility and the developer have implemented the agreement and the developer is developing its project pursuant to the agreement.

The developer asserts that this Commission does have jurisdiction over the Agreement Complaint and the matter is presently ripe for decision by this Commission. The developer also states that the utility's claim that little or no dispute would remain if the agreement were approved as a special service availability contract is incorrect in that the developer would not have signed the agreement had it known the agreement violated the terms of the utility's tariff and rules of this Commission. The developer states that it did not understand the agreement to be a special service availability contract, rather, it understood that the only manner in which service could and would be made available to it was by executing the subject agreement. The developer objects to the utility's suggestion that implementation of the agreement was a mutual violation. Finally, the developer notes that the subject agreement makes repeated reference to obtaining government approval or permits prior to implementation, with specific reference made to this Commission in at least four paragraphs. Thus, it argues, had the utility sought the necessary approvals prior to implementation of the agreement, the agreement's compliance with its tariff could have been determined at that point.

For the purposes of ruling on a Motion to Dismiss, all the facts alleged in the Complaint must be considered as true. Hammonds v. Buckeye Cellulose Corp., 285 So.2d 7 (Fla. 1983).

ORDER NO. .2055
DOCKET NO. 841020-WS
PAGE 3

The Complaint alleges that the utility has implemented the agreement and collected charges in violation of Commission rules and orders. Thus, assuming the truth of the allegations, this issue is ripe for decision. This Commission's pending action upon the utility's request that the subject agreement be approved as a special service availability contract does not moot the issues raised by that complaint or deprive the Commission of jurisdiction to resolve the Agreement Complaint. For the above reasons, we find it appropriate to deny the Motion to Dismiss filed by the utility.

MOTION TO STRIKE PORTIONS OF COMPLAINT

The Motion to Strike addresses three portions of the Water Complaint. Each portion will be addressed separately below.

First, the Complaint states that it is brought for the purpose of determining whether the utility has violated Commission Orders, rules, or tariffs. The utility argues that the reference to Commission rules or tariffs should be stricken as immaterial and irrelevant in that the Complaint contains no allegation of fact or law showing any violation of Commission rules or tariff. The developer argues that the Complaint, particularly paragraphs 7, 9 and 10, does contain allegations of facts and law constituting violations of statutes and orders.

Our review indicates that the Complaint does not contain any specific allegation of violation of Commission rules or tariffs. Upon consideration, we find it appropriate that this portion of the Motion to Strike be granted and that the developer be granted leave to amend the Complaint to include specific allegations of violation of Commission rules or tariffs. Accordingly, if the developer chooses to file an amended complaint, it must do so within 10 days of the issuance of this Order.

Second, the Complaint involves the utility's compliance with Commission Order No. 19564, issued June 24, 1988. Paragraphs 3 through 6 of the Complaint describe the history of a staff assisted rate case which resulted in the issuance of Commission Order No. 19564. The utility argues that paragraphs 3 through 6 should be stricken because such allegations are irrelevant since the Commission issued Order 19564. The developer did not respond to this argument by the utility.

ORDER NO. 22055
DOCKET NO. 891020-WS
PAGE 4

Upon consideration, we find that the history of the staff assisted rate case is not relevant to the utility's compliance with our Order No. 19564, and we order these portions stricken from the complaint.

Finally, the utility moves to strike that part of the Complaint's prayer for relief in paragraph 13, page 5, that the Commission fine the utility. Section 367.161, Florida Statutes, authorizes the imposition of fines for a knowing refusal to comply with, or a willful violation of Chapter 367, Florida Statutes, or a Commission rule or order. The utility argues that the Complaint lacks allegations to support a finding that the utility knowingly refused to comply with, or willfully violated Chapter 367, Florida Statutes, or any rule or order of the Commission.

The developer notes that the Water Complaint lacks a paragraph 13, and that page 5 is the Certificate of Service, and that the reference in the Motion to Strike indicates the utility has apparently confused the Water Complaint with the Sewer Complaint. The developer further asserts that the Water Complaint's prayer for relief merely requests a hearing "to resolve the matters raised herein, and that it be granted such other relief as may be allowable by law."

We note that paragraph 12 of the Water Complaint also requests a hearing "for the purpose of requiring (the utility) to perform the corrective and remedial measures set forth in PSC Order No. 19564, and within the time requirements therein, with the additional request for imposition of penalties due to (the utility's) failure to comply on a timely basis." Therefore, the reference in the prayer for relief to "the matters raised herein" could be considered a prayer that the utility be fined. Further, the Water Complaint does lack specific allegations that the utility knowingly refused to comply with, or willfully violated Chapter 367, Florida Statutes, or a rule or order of the Commission.

Upon consideration, we find that this portion of the Motion to Strike be granted, and that the developer be granted leave to amend the Complaint to include specific allegations that the utility knowingly refused to comply with, or willfully violated Chapter 367, Florida Statutes, or a rule or order of

ORDER NO. 22055
DOCKET NO. 891020-WS
PAGE 5

the Commission. If the Developer chooses to file an amended complaint, it must do so within 10 days of the issuance of this Order.

CONSOLIDATION OF DOCKET NO. 891020-WS WITH
DOCKET NO. 891120-WS

The agreement that is the subject of the Agreement Complaint is also the subject of Docket No. 891120-WS. Rule 25-30.550, Florida Administrative Code, requires Commission approval prior to the effectiveness of such agreements. The subject agreement was executed on October 21, 1986 and submitted for approval by the Commission on October 27, 1988. There has been frequent and extensive correspondence between staff, the utility, and the developer regarding the terms of the agreement. However, we have not officially acted upon the utility's request for approval as a special service availability contract.

Upon consideration, we find that any action the Commission may take regarding the subject agreement is likely to necessitate a hearing pursuant to Section 120.57, Florida Statutes. Further, it appears that the issues raised by the Agreement Complaint and Docket No. 891120-WS can be determined in the same proceeding. Therefore, we will consolidate the Commission's action on the request for approval of the agreement be consolidated in this docket, and set the entire matter for one hearing.

It is, therefore,

ORDERED by the Florida Public Service Commission that North Beach Utilities, Inc.'s motion to dismiss Vilano Ventures, Inc.'s complaint is hereby denied. It is further


ORDERED that North Beach Utilities, Inc.'s motion to strike portions of Vilano Venture, Inc.'s complaint is hereby granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that Docket No. 891020-WS and Docket No. 891120-WS are hereby consolidated and that the entire matter be set for hearing. It is further

ORDER NO. 22055
DOCKET NO. 891020-WS
PAGE 6

ORDERED that the parties shall file all further pleadings
in the consolidated matter under Docket No. 891020-WS.

By ORDER of the Florida Public Service Commission
this 13th day of OCTOBER, 1989.


STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MAB

ORDER NO. 22055
DOCKET NO. 891020-WS
PAGE 7

NOTICE OF FURTHER PROCEEDINGS OR 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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), 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 sewer utility. A motion for 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.