BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint for entry of an order directing JJ'S MOBILE HOMES, INC. to provide permanent service in Lake County to George Wimpey of Florida, Inc. d/b/a Morrison Homes	DOCKET NO. 910956-WS ORDER NO. PSC-92-0778-FOF-WS ISSUED: 08/10/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

FINAL ORDER APPROVING PERMANENT SERVICE AGREEMENT

BY THE COMMISSION:

BACKGROUND

JJ's Mobile Homes, Inc. (JJ's or the utility) is a utility providing water and wastewater service to approximately 138 customers in Lake County. Shelby Development is a Florida general partnership. George Wimpey of Florida, Inc. (the developer) is a Florida corporation which, together with Shelby Development d/b/a Monarch Homes, is in the process of developing a planned 780-unit single family home subdivision in JJ's service territory.

On September 16, 1991, the developer filed an "Emergency Complaint" seeking the Commission to 1) direct the utility to enter an agreement to provide permanent service; 2) require the utility to file a construction schedule; and 3) direct the utility to provide the 216 equivalent residential connections (ERCs) capacity contracted for in the Temporary Service Agreement. The developer also requested an emergency hearing in order to avoid disruption of water and wastewater services. This is the second complaint for service filed by the developer in 1991. The first complaint was resolved by Order No. 24412, issued April 22, 1991, which ordered JJ's to provide service to the developer and required the parties to enter into a temporary service agreement. That agreement, entered into on April 12, 1991, provided for 216 ERCs to be reserved for the developer for a fee of $156,685. The utility is currently providing bulk service to the developer.

In this docket, we previously considered the subject complaint and by proposed agency action (PAA) Order No. 25562, issued January 2, 1992, this Commission required the utility to provide documentation of completion of construction designed to increase capacity, together with the Department of Environmental Regulation (DER) certification by February 29, 1992. On February 28, 1992, the utility filed a certificate of substantial completion of facilities, and by letter dated March 19, 1992, DER cleared the completed expansion for service.

Order No. 25562 also required the utility to enter into a permanent service agreement with the developer by January 31, 1992. Thereafter, on January 7, 1992, the utility filed a petition for authority to gross-up contributions-in-aid-of-construction (CIAC), and on February 6, 1992, the utility filed a Motion for Extension of Time to enter into the service agreement until after the requested gross-up authority was approved. On July 15, 1992, the utility filed a copy of the executed permanent service agreement.

PERMANENT SERVICE AGREEMENT

We have reviewed the permanent service agreement and find that, in addition to the traditional provisions agreeing to serve, to provide capacity, and to inspect connections when a new customer is added, the parties have included in this agreement several provisions unique to their situation. The agreement reached contemplates that Phase One of the developer's development will be served as a bulk service customer, and that the developer may assign the ownership and operation of the Phase One facilities to a homeowners' association. The agreement further provides that the utility may demand transfer of the facilities of Phase One, but only if there will be no tax impact to the developer or transferor. The developer will be required to pay gross-up charges on CIAC related to other phases of the development.

In addition, during the process of negotiating this agreement, it was discovered that a portion of the developer's property, not yet developed or receiving service, is not in the utility's service territory. Included in the permanent service agreement is a provision requiring the service territory to be amended.

Paragraph 12 of the permanent service agreement provides that the developer will not operate as a utility. However, we find that this provision may be an impossibility for the developer if the

customers are charged for service by either the developer or the homeowners' association to which the facilities in Phase One may be transferred. Section 367.021 (12), Florida Statutes, defines "utility" as an entity which provides water or wastewater service to the public for compensation. However, pursuant to Section 367.022, Florida Statutes, certain utilities may be exempt from Commission regulation. The developer has transferred the Phase One facilities to a homeowners' association, which the Commission determined to be exempt pursuant to Order No. PSC-92-0745-FOF-WS, issued August 3, 1992. Thus, at the present time, the developer's successor, the homeowners' association, is operating as an exempt utility. This Commission is not bound by this provision of the developer agreement which states that the developer will not operate as a utility. Although this section of the agreement may be an impossibility in a technical sense, it reflects the intention of the parties to have the Phase One facilities operated by the exempt homeowners' association. We find that this intent of the parties is not in contravention of applicable statutes or rules.

Based on the foregoing, we find it appropriate to approve the permanent service agreement.

MOTION FOR EXTENSION OF TIME

The disagreements between this utility and the developer are longstanding. As discussed above, Order No. 25562 required that a permanent service agreement be entered into by January 31, 1992. No agreement was entered into by January 31, 1992, nor was a timely request for an extension of time filed. However, on January 7, 1992, the utility filed a petition to gross-up CIAC. Thereafter, the utility filed the subject Motion for Extension of Time on February 6, 1992, seeking to delay the execution of the permanent service agreement until after the petition for gross-up authority was approved. On February 17, 1992, the developer filed a motion in opposition to the requested extension of time arguing that granting the motion would unfairly prejudice the developer and would openly defy a Commission Order with no penalty.

We find approval of gross-up authority prior to the finalization of the permanent service agreement would have caused the developer to incur liability for gross-up on facilities which the developer intended to donate to the utility. Further, we find that since the utility did not have authority to gross-up CIAC and did not request that authority until January 7, 1992, the developer

should not have expected to incur the additional payment of gross-up on CIAC. However, we also find that to require the utility to assume the additional tax liability without authority to gross-up CIAC would have caused a tax burden for the utility which could have been in excess of the utility's annual revenue. This untenable situation was resolved by the parties' agreement to have the Phase One facilities served as a bulk service customer, thus avoiding the donation of Phase One facilities and any tax impact relating to that portion of the development. Using this solution, the parties were able to hammer out the rest of the details necessary to enter into the permanent service agreement on July 13, 1992.

We find that the developer was not prejudiced by the delay in entering into the agreement. Further, we find that, once the petition for gross-up was filed and the potential tax implications were understood, there was a real concern that steps be taken to ensure a fair resolution of the situation. Therefore, for the reasons stated above, we find it appropriate to grant the utility's Motion for an Extension of Time. Further, based on this determination, we find the utility's Motion filed on March 9, 1992, to strike portions of the developer's response to the Motion for an Extension of Time, to be moot.

NO IMPOSITION OF PENALTIES

The utility's Motion for an Extension of Time was not filed on or before the date by which the permanent service agreement was to be entered into. Further, the utility failed to explain the delay relating to the filing of its motion, other than stating that the utility received certain information from the developer on the due date, January 31, 1992. For these reasons, we find that the utility failed to comply with the requirements of Order No. 25562. However, because there was no harm to the developer, and because the parties have now reached an agreement, we have not imposed any penalties for the brief period of noncompliance.

The developer's complaint was filed to secure additional capacity and an executed permanent service agreement. The utility has now provided the additional capacity and the parties have now executed a permanent service agreement. There is no further action required in this docket and this docket is hereby closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the permanent service agreement executed by JJ's Mobile Homes, Inc. and George Wimpey of Florida, Inc., is hereby approved. It is further

ORDERED that the Motion for Extension of Time filed by JJ's Mobile Homes, Inc., is hereby granted. It is further

ORDERED that the Motion to Strike filed by JJ's Mobile Homes, Inc., is moot. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission this 10th day of August, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CB

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 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 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 or sewer 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.