BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Amendment of Certificate No. 247-S to Include Territory Held by CARRIAGE VILLAGE LANDOWNER'S ASSOCIATION, INC., Cancellation of Certificate No. 57-S, and for Limited Proceeding to Impose Current Rates in Lee County, by NORTH FORT MYERS UTILITY, INC.	DOCKET NO. 931164-SU ORDER NO. PSC-94-0450-FOF-SU ISSUED: April 14, 1994

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
DIANE K. KIESLING

FINAL ORDER GRANTING AMENDMENT TO CERTIFICATE NO. 247-S AND CANCELLATION OF CERTIFICATE NO. 57-S AND PROPOSED AGENCY ACTION ORDER APPROVING NORTH FORT MYERS UTILITY, INC.'S CURRENT RATES AND CHARGES FOR AMENDED TERRITORY

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein, except for the granting of the amendment to Certificate No. 247-S, the cancellation of Certificate No. 57-S, and the provision for interim rates and charges in the event of a protest, is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

North Fort Myers Utility, Inc. (NFMU or applicant) is a Class B utility which provides regional wastewater service to approximately 2,700 customers in northern Lee County. The utility's 1992 annual report indicates an annual operating revenue of $687,000 and a net operating deficit of $204,000. The NFMU

treatment plant and disposal system has a capacity of two million gallons per day and has considerable excess capacity. NFMU is in a designated critical use area and utilizes spray irrigation of treated effluent as its primary means of disposal with backup disposal by means of deep well injection system.

On December 1, 1993, NFMU filed an application for amendment of its Wastewater Certificate No. 247-S to include service to the territory currently being served by Carriage Village Landowner's Association, Inc. (CVLOA or association) and for a limited proceeding to establish rates and charges for this territory. The service territory currently being served by CVLOA is under Certificate No. 57-S and is comprised of the Carriage Village and Royal Coach subdivisions containing approximately 434 mobile homes.

Ninety-five percent of the shareholders of CVLOA voted to enter into an agreement with NFMU to interconnect with NFMU and to transfer CVLOA's collection system to NFMU so that it could abandon and dismantle its wastewater treatment and disposal facilities. The total number of votes was 296 in favor and 17 against this interconnection. Subsequently, NFMU and CVLOA entered into a wastewater service agreement dated November 18, 1993 for connection to NFMU, the payment of service availability charges and implementation of NFMU's monthly service charges.

A formal objection to the proposed interconnection signed by five customers was timely received. As discussed further in the body of this order, at the customer meeting these parties withdrew their objection. A customer meeting was held in the service territory on January 27, 1994 for the purpose of hearing the customers' comments concerning the interconnection. Approximately 150 customers attended the meeting and approximately 11 customers were sworn in and made statements of their concerns.

NFMU filed a Petition for Interim Relief on February 16, 1994 in the belief that this docket would not be addressed by the Commission before June 21, 1994. In this petition, NFMU requested that the applicant be authorized to collect its rates and charges during the pendency of this proceeding. However, in recognition of the existing problems with the CVLOA's wastewater system, we expedited resolution of this docket. Therefore, the petition is moot.

Withdrawal of Objections

By letter received January 7, 1994, Mr. E. Duane Ackerman, Ms. Anna Marie Sturgeon, Mr. and Mrs. R. Frye, and Mr. S. Porter Smith protested the interconnection between NFMU and CVLOA and the

proposed rates and charges. Their primary concern was the belief that CVLOA did not provide the shareholders with sufficient information to make a considered choice in casting their ballot for the interconnection to NFMU. At the customer meeting, Mr. Ackerman acted as the spokesman for this group of five persons.

He provided Staff with a letter from Barbot, Steuart and Associates, Inc., Consulting Engineers proposing an engineering study at a cost of $2,000 to complete the reports required by the Department of Environmental Protection (DEP). The consulting engineers anticipated that they could produce construction plans for an additional $3,000. In addition, they estimated that modifications to the plant in the form of surge tanks and chlorine contact capacity would not exceed $45,000. Mr. Ackerman stated that the association had $100,000 in cash reserves that could cover these expenditures and that DEP would allow them time to make the necessary corrections. He also made comments relative to his prior presentations to the Board of Directors.

There appeared to be much acrimony between Mr. Ackerman and members of the Board of Directors (Board) of the association. Several members of the Board disputed his version of the events. They stated that the engineering firm submitting the proposal was partially responsible for the utility's current problems because it had failed to properly file for the DEP permit. They also inferred that the engineering firm had not accurately determined all the existing problems and that the $45,000 repair estimate was very low.

Our Staff met with the group of objectors after the customer meeting to try and determine whether they wished to continue as parties in this docket. All of them stated that so long as the information they provided was part of the official record they would be satisfied. They were not interested in further pursuing their objections, particularly since such a large majority of the other homeowners had approved the interconnection. To assure that there was no misunderstanding, follow-up letters were sent to each of them confirming our Staff's conversation and advising them that we would remove them as official objectors unless we received a letter from them stating otherwise by February 20, 1994. There was no response to these follow-up letters.

Based on the foregoing, we recognize the withdrawal of the objection letter received January 7, 1994 signed by Mr. E. Duane Ackerman, Ms. Anna Marie Sturgeon, Mr. and Mrs R. Frye, and Mr. S. Porter Smith and remove them as parties to this action.

Amendment to Certificate

On December 1, 1993, NFMU filed an application for amendment of its wastewater Certificate No. 247-S to include the territory currently being served by CVLOA in Lee County. The application is in compliance with the governing statute, Section 367.045, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for amendment of certificate. The application contains a check in the amount of $500, which is the correct filing fee pursuant to Rule 25-30.020(2)(b), Florida Administrative Code. In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code.

The applicant has provided evidence that the utility owns the land upon which the utility's treatment and disposal facilities are located in the form of a warranty deed as required by Rule 25-30.036(1)(d), Florida Administrative Code. Adequate service territory and system maps and a territory description have been provided as prescribed by Rule 25-30.036(1)(e), (f), and (i), Florida Administrative Code. A description of the territory requested by the utility is appended to this order as Attachment A. The utility has submitted an affidavit consistent with Section 367.045(2)(d), Florida Statutes, that it has tariffs and annual reports on file with this Commission.

NFMU has been operating a wastewater treatment facility in the area for a number of years with adequate technical and financial ability, and is expected to continue to do so. Although the utility's annual report shows a deficit in net operating income, this deficit is due to a large amount of excess capacity and the necessity for a large used and useful adjustment. The expansion will be financed by the collection of service availability charges to cover system capacity for the subdivisions. Consequently, no material impact will occur regarding the applicant's capital structure.

No conflict with the local comprehensive plan will occur as the result of this interconnection since service in this territory has been going on for an extensive period of time. NFMU is operating its system in accordance with the DEP permit which expires May 30, 1995. An inquiry to DEP revealed no problems regarding compliance with environmental regulations.

NFMU was initially certificated with the intention that it become a regional treatment and disposal system and that small systems in the North Fort Myers area would be connected to it as soon as it was feasible to do so. DEP has taken the position that

it makes sound environmental sense to take small on-site package plant wastewater systems off-line as soon as it becomes feasible where a regional system is ready, willing and able to take over the service. This docket is an example of that very scenario. One of the witnesses at the customer meeting testified that the permit issued for CVLOA's wastewater plant in 1978 was for a temporary installation. According to the witness, the permit states, "(t)his plant will be disconnected and system will be tied into an area-wide system when it becomes available."

On July 16, 1993 the Board of Directors of CVLOA created a committee to study a formal warning notice of potential violations issued by the DEP on July 13, 1993. The committee was to make a recommendation as to how to correct the violations or find some alternate resolution to the problem. After the study, the board prepared a letter and ballot that was sent to each shareholder of the association. The letter explained that the plant was operating under potential DEP violations and the committee recommended interconnection to NFMU. The ballot was used to allow the shareholders to vote on the approval or disapproval of interconnection to NFMU. As noted earlier the shareholders of CVLOA overwhelmingly voted to enter into an agreement with NFMU to interconnect and to transfer their collection system to NFMU so that they could abandon and dismantle their wastewater treatment and disposal facilities.

DEP advised us that the recently renewed operating permit was based on information supplied by CVLOA's engineer. However, the information which was supplied was incorrect, and upon further inspection by DEP, the system was found to be an unapproved disposal system. DEP notified CVLOA that it would have to cease and desist using the unapproved disposal method because continued operation of the wastewater plant would place the system in serious violation of environmental regulations. The plant had reached a point where substantial capital expenditures were necessary to bring the system into compliance with DEP standards. DEP advised CVLOA that it would delay formal enforcement actions pending the outcome of this docket.

There is every reason to believe that by connecting the CVLOA system to a regional system now, in addition to untold benefits to the environment, the customers will benefit in the long term by reduced costs and significantly improved service. Because a sizeable amount of funds would need to be invested to bring the overall existing system into compliance, the customers served by that system would likely see a considerable increase in their service rates. Whether the customers pay for improvements through rates or through service availability charges has the same end

result. The customers, one way or the other, are going to be required to pay for service in the context of today's environmental concerns in Florida.

Based on the above information, we find it in the public interest to grant the application of North Fort Myers Utility, Inc. for amendment of Certificate No. 247-S, to transfer the CVLOA collection system to NFMU, and to cancel CVLOA's wastewater Certificate No. 57-S. The utility has returned the certificate for entry to include the additional territory and has filed revised tariff sheets which reflect the amended territory description. CVLOA's certificate is hereby cancelled. However, CVLOA shall be responsible for the payment of regulatory assessment fees and filing of annual reports through the last month that it provides service.

Rates and Charges

NFMU's approved rates and charges were effective August 2, 1993 pursuant to a 1993 Price Index. A comparison of the rates currently charged by CVLOA and by NFMU is shown below:

Carriage Village Landowners Association, Inc.:

Carriage Village Subdivision:
A flat monthly charge of $10.89 per residence

Royal Coach Subdivision:
A flat monthly charge of $9.29 per residence

North Fort Myers Utility, Inc.:

Base Facility Charge (monthly):	$10.09
Gallonage Charge per 1,000 gallons (Maximum 10,000 gallons)	$ 3.66

NFMU has indicated that the amendment will have no significant impact on its existing rates and charges. Based on the foregoing, the rates and charges of NFMU shall be applied to customers in the new service territory. NFMU shall bill each customer in the service area based upon metered water flows provided by Lee County. If no timely protest is filed, the NFMU rates shall be effective for charges on or after the stamped approval date of the tariffs applicable to this proceeding. If a timely protest is filed, the NFMU rates shall go into effect, subject to refund with interest.

Service Availability Charges

In the service agreement executed between NFMU and CVLOA on November 18, 1993, the parties agreed that the charges for service availability (plant capacity) for each residential customer would be a total of $740 for system capacity and the income tax gross-up on contributions-in-aid-of-construction (CIAC). The charges are correctly based on NFMU's approved tariffs on file with the Commission which calls for payment based upon $635 per equivalent residential connection (ERC) at 275 gallons per day (GPD) per ERC. NFMU took the position that 200 GPD was appropriate for a mobile home resulting in a basic charge of 200/275 x $635 = $462 per ERC. The corporate income tax rate of 37.63% results in a grossed-up charge of $740 per ERC. In addition, the agreement has a payment schedule which allows each customer to elect to pay the full charge or to amortize the charge over a five year term at a 10% interest rate. The amortized payment amounts to a monthly fee of $15.72 for each customer choosing this method of payment. Based on the foregoing, we find the service availability charge of $740 to be appropriate.

If no timely protest is filed, the NFMU service availability charges shall be effective for connections on or after the stamped approval date of the tariffs applicable to this proceeding. If a timely protest is filed, the NFMU service availability charges shall go into effect, subject to refund with interest.

Temporary Rates in the Event of Protest

We have determined that the amount of security required for the approved rates and charges, including service availability charges is $442,906, which includes the annual excess revenue that would be collected based upon the flat rate charged by CVLOA and the approved rate for NFMU, the amount of CIAC to be collected pursuant to the service agreement executed between NFMU and CVLOA, and the interest thereon based upon the most recent commercial paper rate. We evaluated the financial position and result of operations for the year 1992 as reported in NFMU's annual report and found that a corporate undertaking is not financially supportable in the circumstances. NFMU reported a deficit in net operating income, a very high debt to equity ratio, negative net working capital, and interest payments in excess of annual revenues.

Therefore, in the event of a protest, we hereby authorize the utility to collect the rates and charges as approved herein, on a temporary basis, subject to refund, provided that the utility first

furnish and have approved by Commission Staff adequate security for a refund, through a bond or letter of credit in the amount of $442,906, or an escrow agreement, and revised tariff sheets.

If the utility chooses a bond as security, the bond should contain wording to the effect that it will be terminated only under the following conditions:

1) The Commission approves the rates and charges; or

2) If the Commission denies the rates and charges, the utility shall refund the amount collected that is attributable to these rates and charges.

The utility should maintain a record of the amount of the bond, and the amount of the revenues that are subject to refund. In addition, after the rates and charges are in effect, the utility should file reports with the Division of Water and Wastewater no later than 20 days after each monthly billing. These reports shall indicate the amount of revenue collected.

If the utility chooses a Letter of Credit as security, it should contain the following conditions:

1) The letter of credit is irrevocable for the period it is in effect.

2) The letter of credit will be in effect until a final Commission order is rendered, either approving or denying the rates and charges.

If the security is provided through an escrow agreement, the following conditions should be part of the agreement:

1) No refunds in the escrow account may be withdrawn by the utility without the express approval of the Commission.

2) The escrow account shall be an interest bearing account.

3) If a refund to the customers is required, all interest earned by the escrow account shall be distributed to the customers.

4) If a refund to the customers is not required, the interest earned by the escrow account shall revert to the utility.

5) All information on the escrow account shall be available from the holder of the escrow account to a Commission representative at all times.

6) The amount of revenue subject to refund shall be deposited in the escrow account within seven days of receipt.

7) The escrow agreement shall reflect that the escrow account is established by the direction of the Florida Public Service Commission for the purpose (s) set forth in its order requiring such account. Pursuant to Consentino v. Elson, 263 So. 2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.

8) The Director of Records and Reporting must be a signatory to the escrow account.

In no instance should the maintenance and administrative costs associated with the refund be borne by the customers. These costs are the responsibility of, and should be borne by, the utility. Irrespective of the form of security chosen by the utility, an account of all monies received as a result of the rate increase should be maintained by the utility. This account must specify by whom an on whose behalf such monies were paid. If a refund is ultimately required, it should be paid with interest calculated pursuant to Rule 25-30.360(4), Florida Administrative Code.

Rate Base

This transfer for the interconnection of CVLOA's system to NFMU involves only the collection system and lift stations of CVLOA. The collection system and lift station of CVLOA will be donated to NFMU as contributions-in-aid-of-Construction (CIAC). Therefore, we find that no effect on NFMU's rate base will result.

Rate base was last established for CVLOA in Order No. 21434, issued June 26, 1989. This order concerned a transfer from Mobile Land and Title Company to CVLOA. As of May 31, 1988, the rate base was $91,272. The CVLOA's 1992 Annual Report reflects an unaudited rate base of $204,434. However, this amount reflects the total system, including treatment and disposal equipment, land, and structure and improvements. As discussed above, these items will not be involved in the transfer and will be abandoned by CVLOA.

Also, since the plant will be donated and NFMU will pay no monetary consideration to CVLOA for the transfer of these facilities, no acquisition adjustment is necessary.

Based on the foregoing, it is, therefore

ORDERED by the Florida Public Service Commission that North Fort Myers Utility's application for amendment of its wastewater Certificate No. 247-S to include territory held by Carriage Village Landowner's Association, Inc., as described in Attachment A is hereby approved.

ORDERED that wastewater Certificate No. 57-S granted to Carriage Village Landowner's Association, Inc. is hereby cancelled. It is further

ORDERED that Carriage Village Landowner's Association, Inc. is hereby responsible for the payment of regulatory assessment fees and filing of annual reports through the last month that it provides service. It is further

ORDERED that Mr. E. Duane Ackerman, Ms. Anna Marie Sturgeon, Mr. and Mrs R. Frye, and Mr. S. Porter Smith be removed as parties in this docket. It is further

ORDERED that North Fort Myers Utility's application for a limited proceeding to implement its rates and charges for the customers of Carriage Village Landowner's Association, Inc. is hereby approved, as discussed herein. It is further

ORDERED that prior to its implementation of the rates and charges approved herein, North Fort Myers Utility shall submit and have approved revised tariff sheets. The revised tariff sheets will be approved upon our Staff's verification that they are consistent with our decision herein and that the protest period has expired. It is further

ORDERED that in the event of a protest, the utility shall collect the rates and charges as approved herein, on a temporary basis, subject to refund, provided that the utility first furnish and have approved by Commission Staff adequate security for a refund, through a bond or letter of credit in the amount of $442,906, or an escrow agreement, and revised tariff sheets.

ORDERED that there is no rate base associated with the transfer of the collection system as of the date of transfer from CVLOA to NFMU. It is further

ORDERED that the provisions of this Order, except for the granting of amendment to Certificate No. 247-S, the cancellation of

Certificate No. 57-S and the provision for interim rates and charges in the event of a protest which are final action, are proposed agency action and shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission, this 14th day of April, 1994.

BLANCA S. BAYO, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

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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.

As identified in the body of this order, our action herein except for except for the granting of amendment to Certificate No. 247-S, the cancellation of Certificate No. 57-S and the provision for interim rates and charges in the event of a protest, is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code.

Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on May 5, 1994. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by 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 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 of the effective date 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.

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 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.

ATTACHMENT A

NORTH FORT MYERS UTILITY, INC.

TERRITORY DESCRIPTION - LEE COUNTY

CARRIAGE VILLAGE

In Township 43 South, Range 24 East.

Section 36 Begin at a point being 100 feet and on a bearing of South 89° 461 East from the West 1/4 corner of said Section 36; thence South 0° 02' 50" East 1,460.44 feet, thence North 89° 25' 40" East 270.34 feet, thence North 56° 22' 55" East 772.80 feet, thence South 33° 34' 35" East 6.14 feet, thence North 56° 25' 10" East 565.16 feet, thence South 33° 34' 50" East 600 feet, thence North 56° 25' 10" East 600 feet, thence South 33° 34' 50" East 128.87 feet, thence North 56° 01' 45" East 1,158.67 feet, thence North 0° 17' 40" East 331.64 feet, thence West along the East-West center line of said Section 36 to the Point of Beginning.