

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for amendment of Certificate No. 247-S by NORTH FORT MYERS UTILITY, INC. and cancellation of Certificate No. 240-S issued to LAKE ARROWHEAD VILLAGE, INC. in Lee County.)	DOCKET NO. 930373-SU
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In Re: Application for limited proceeding for approval of current service rates, charges, classifications, rules and regulations, and service availability policies for customers of LAKE ARROWHEAD VILLAGE, INC. in Lee County, by NORTH FORT MYERS UTILITY, INC.)	DOCKET NO. 930379-SU ORDER NO. PSC-95-0788-FOF-SU ISSUED: June 30, 1995

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

On April 9, 1993, North Fort Myers Utility, Inc. (NFMU) filed an application for amendment of its Wastewater Certificate No. 247-S to include service to the Lake Arrowhead Village (LAVI) and Laurel Estates subdivisions (Docket No. 930373-SU). On April 13, 1993, NFMU filed for a limited proceeding to implement its rates and charges for those subdivisions (Docket No. 930379-SU).

Order No. PSC-93-1821-FOF-WS, issued on December 22, 1993, as proposed agency action (PAA), approved the request to amend NFMU's certificate and approved the limited proceeding request to charge its current rates and charges in the approved territory. In the event of protest of the PAA Order, NFMU was authorized to collect rates and charges on a temporary basis subject to refund. The order was protested, and the matter was scheduled set for an August 17, 1994, formal hearing. Pending the outcome of the protests, NFMU began providing service but did not charge or collect service availability charges.

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Prior to the hearing, the parties entered a stipulation whereby the parties withdrew "their protests to the PAA order as it relates to granting NFMU an amendment of its certificate, cancelling LAVI's certificate, imposing NFMU's rates on LAVI's current customers, and imposing NFMU's charges (with the exception of the service availability charges) on LAVI's current customers." Although service availability charges are generally paid at the time of connection, the stipulation further provided: "NFMU agrees not to collect any service availability charges from customers of Lake Arrowhead Village, Inc. until after a final order is issued in this docket which determines the appropriate amount of service availability charges, and the appropriate person(s) to pay such charges." This stipulation was approved by the Commission by Order No. PSC-94-0737-FOF-SU, issued June 15, 1994.

A hearing was held on August 17, 1994, in Fort Myers, Florida. By Order No. PSC-94-1553-FOF-SU, we approved a service availability charge to be collected by NFMU to serve the customers formerly served by LAVI to be \$740 per mobile home connection (\$462 plus gross-up), and also provided to the customers an option to pay for the charge on an installment plan.

The Office of Public Counsel (OPC) filed a Motion for Reconsideration of Order No. PSC-94-1553-FOF-SU. That motion was granted in part and denied in part by Order No. PSC-95-0419-FOF-SU, issued March 27, 1995. OPC then, on April 24, 1995, filed its notice of appeal of both orders.

Pursuant to Rule 9.310(2), Fla. R. App. P., the filing of a Notice of Appeal by a public body, such as OPC, acts automatically as a stay pending review. However, that same rule grants the Commission the authority to vacate the stay, and Rule 25-22.061(3), Florida Administrative Code, sets forth the conditions under which a utility may move to vacate a stay, and under what conditions the Commission should or may vacate such stay.

Citing the provisions of Rule 25-22.061(3), Florida Administrative Code, NFMU filed a Motion To Vacate Stay Pending Review on April 25, 1995. OPC filed a Response To Motion To Vacate Stay Pending Review on May 8, 1995. On May 19, 1995, the Prehearing Officer issued Order No. PSC-95-0612-PCO-SU, which granted NFMU's motion to vacate the automatic stay. That order stated at page 4 that "it appears that NFMU has shown that a vacation of the stay is warranted as long as there are sufficient safeguards for the customers in the event the OPC is successful on appeal." The order set forth the conditions for an escrow account in order to protect the disputed funds.

On May 30, 1995, OPC filed a motion for reconsideration of Order No. PSC-0612-PCO-SU. Rule 25-22.060, 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 standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Company of Miami v. King, 146 So.2d 889 (Fla. 1962). In Diamond Cab, the Court held that the purpose for a petition for reconsideration is to bring to an agency's attention a point which was overlooked or which the agency failed to consider when it rendered its order. That point is generally a mistake in law or a mistake in fact. In Stewart Bonded Warehouses v. Bevis, 294 So.2d 315 (Fla. 1974), the Court held that a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. We have applied this rationale in our review of OPC's motion.

OPC's primary contention was contained in the final paragraph of its current motion. OPC argued that the Commission failed to consider its estoppel argument which was contained in Paragraph 7 of its May 8, 1995 response to NFMU's motion. OPC stated in its motion for reconsideration that the agreement between the parties that no service availability charges would be collected until after an order is finally issued, should estop NFMU from collecting charges until the final appellate review of the case. This contention may have been a valid one for consideration, but a review of OPC's original response reveals that OPC did not raise that argument in its response, at least not to the level necessary for us to consider or rule upon it.

Paragraphs 1-6 of OPC's response all concerned the fairness and reasonableness of granting NFMU's request to lift the stay. OPC discussed the utility's position, and the potential harm to the customers if the stay is lifted. On page 5 of its response, OPC cited Paragraphs 4 and 5 as grounds for dismissing the motion. Those paragraphs do not raise the issue of estoppel, but instead discussed the potential harm to the utility and the customers. Paragraph 7, which is the paragraph OPC contended the Commission failed to consider, stated, in its entirety:

While the parties agreed to delay collection of the disputed charge until a final decision was rendered, the Citizens do not believe the Commission's decision is truly final until after all of the parties have exercised their appellate rights. This would be true regardless of the party seeking judicial review, and is obviously subject to the stay provided in Florida Statutes.

This paragraph contained the only reference to the agreement between the parties. It did not raise the issue of whether the utility should be estopped from collection because of their agreement in any substantial manner. OPC contended that paragraph 7 "suggested" that the stipulation should estop NFMU from collection. We do not agree with this interpretation. The reference to the agreement was in an introductory clause in the sentence, a sentence which addresses whether our decision is final until after appeal. Although OPC did not raise that argument below, it addressed it in its motion for reconsideration. However, because OPC did not raise the issue of the implication of the agreement in its original motion, its use of the argument in its motion for reconsideration is specious.

Order No. PSC-95-0612-PCO-SU adequately addressed the issues which were raised in NFMU's motion and OPC's response. The order recited the provisions of Rule 25-22-061(3)(a) and (b), Florida Administrative Code, which permits the Commission to vacate a stay upon motion while a matter has been appealed. On page 4 of the order, we found that "[u]pon review of the motion and of OPC's response, it appears that NFMU that NFMU has shown that a vacation of the stay is warranted..."

OPC raised the issue of finality in its original response, and attempted to raise it in regards to the estoppel argument in its motion for reconsideration. Finality is not at issue when vacating a stay under Rule 25-22.061, Florida Administrative Code. Instead, the rule acknowledges that certain provisions of an order may be placed into effect while the order is taken on appeal. We also note that Order No. PSC-95-0612-PCO-SU granted exactly what OPC requested in the alternative in its response. OPC stated on page 5 of its response that if the Commission does grant NFMU's motion, the Commission should order NFMU to hold at least \$365 of the charge in escrow. Order No. PSC-94-0612-PCO-SU does exactly that.

After a review of that order, we find that all relevant points were considered and that no point or law or fact was overlooked. OPC has not demonstrated that we overlooked a point of fact or law, and has not met the standard for reconsideration set forth in Diamond Cab. Therefore, OPC's motion for reconsideration is denied.

This docket shall remain open while this matter is on appeal before the First District Court of Appeal.

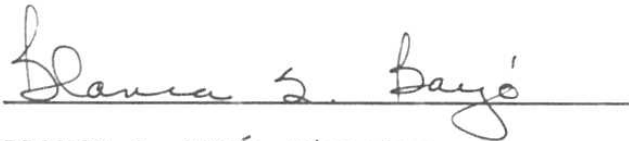
Based on the foregoing, it is, therefore,

ORDER NO. PSC-95-0788-FOF-SU
DOCKETS NOS. 930373-SU, 930379-SU
PAGE 5

ORDERED by the Florida Public Service Commission that the motion for reconsideration of Order No. PSC-94-0612-PCO-SU filed by the Office of Public Counsel is hereby denied. It is further

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

By ORDER of the Florida Public Service Commission, this 30th day of June, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.

Any party adversely affected by the Commission's final action in this matter may request 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.