

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-95-0612-PCO-SU ISSUED: May 19, 1995

ORDER VACATING AUTOMATIC STAY

Background

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 this PAA Order, NFMU was authorized to collect rates and charges on a temporary basis subject to refund. The order was protested, and the protests were set for formal hearing on August 17, 1994. Pending the outcome of the protests, NFMU began providing service but did not charge or collect service availability charges.

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."

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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, dated June 15, 1994.

In preparation for the hearing on the remaining issues not resolved by the above-noted Stipulation, a Prehearing Conference was held on July 22, 1994, and six issues were identified. However, prior to the hearing, the parties, with the approval of the Commission, agreed that only the following two issues were left to be considered:

1. What is the appropriate amount of service availability charge to be collected by NFMU to serve the customers formerly served by LAVI?
2. Should the Commission establish a new "senior citizen mobile home owners" class of customer for service availability charges?

A hearing was held on August 17, 1994, in Fort Myers, Florida. By Order No. PSC-94-1553-FOF-SU, the panel 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, and this 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 the OPC, shall act 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. The OPC filed a Response To Motion To Vacate Stay Pending Review on May 8, 1995.

Motion To Vacate Automatic Stay

In serving its motion on April 25, 1995, the utility cites Rule 25-22.061(3)(a) and (b), Florida Administrative Code, which states in pertinent part:

(3)(a) When a public body . . . appeals an order involving an increase in a utility's . . . rates, which appeal operates as an automatic stay, the Commission shall vacate the stay upon motion by the utility . . . and the posting of good and sufficient bond or corporate undertaking. . . .

(b) When a public body . . . appeals an order that does not involve an increase in rates, the Commission may vacate the stay or impose any lawful conditions.

Without stating which subsection is applicable, NFMU argues that it connected Lake Arrowhead and Laurel Estates to its wastewater system on or about February 23, 1994, and that it has already lost thousands of dollars in interest it would have received if it had been allowed to collect the service availability charges at the time of connection as is normal. NFMU further argues that if peak flow was the appropriate measure of NFMU's service availability charge, then OPC admits that the appropriate service availability charge is \$518 (or only \$222 is in dispute). Based on the above, and recognizing that the customers must be protected for the amount in dispute, NFMU has requested that it be allowed to collect the full \$740, and place \$222 of that amount in an escrow account (or if being paid on the installment plan, to collect the full amount of the installment and escrow 30% of each payment, i.e., \$222 divided by \$740).

The OPC argues that Rule 25-22.061(3)(a), Florida Administrative Code, is not applicable because the order in question involves service availability charges and not an increase in rates. OPC further argues that to vacate the stay would harm the customers, many of whom are on fixed incomes, if the charge should later be found to be unjust, unfair, or unreasonable. OPC also disputes NFMU's claim that only \$222 of the charge is in dispute, and states that actually \$365 is in dispute.

The OPC admits that if peak flow is the appropriate measure of NFMU's service availability, then only \$222 is in dispute. However, the OPC, in its response, disputes that peak flow is the appropriate measure. Therefore, based on the OPC's response, the

OPC disputes \$365 of each payment, and if the OPC prevails on all points on appeal, it is this amount that should be protected.

Upon review of the motion and of OPC's response, 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. However, OPC's response shows that \$365 of the \$740 charge is in dispute, and it is this amount that shall be escrowed. Therefore, pursuant to Rules 25-22.061(3) and (5) [this section specifically authorizes the Commissioner assigned as the prehearing officer in the case to rule on motions filed under subsection (3)], Florida Administrative Code, NFMU shall be allowed to collect the charge of \$462 plus gross-up, totalling \$740, but shall escrow \$365 pending the final outcome of the appeal. For those customers paying on the installment plan, NFMU shall collect the full amount of the installment but escrow 50 percent of each payment up to a maximum of \$365 (\$365 divided by \$740 is approximately 50 percent).

- 1) No funds 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) This 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 agreement.

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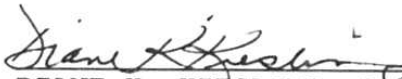
In no instance should the maintenance and administrative costs associated with any refund be borne by the customers. These costs are the responsibility of, and should be borne by, the utility. A account of all monies received as a result of the increased service availability charges shall be maintained by the utility. This account must specify by whom and 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.

Based on the foregoing, it is, therefore,

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that the Motion To Vacate Stay Pending Review is granted in part as set out in the body of this order. It is further

ORDERED that NFMU shall escrow \$365 of each \$740 charge collected, or 50 percent of each installment, pending the outcome of the appeal of Order Nos. PSC-94-1553-FOF-SU and PSC-95-0419-FOF-SU.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 19th day of May, 1995.



DIANE K. KIESLING, Commissioner and
Prehearing Officer

(S E A L)

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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 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 wastewater 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.