State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: JANUARY 4, 2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (VAN LEUVEN)
DIVISION OF REGULATORY OVERSIGHT (JOHNSON, REDEMANN)

RE: DOCKET NO. 000277-WS - APPLICATION FOR TRANSFER OF FACILITIES AND CERTIFICATES NOS. 353-W AND 309-S IN LEE COUNTY FROM MHC SYSTEMS, INC. D/B/A FFEC-SIX TO NORTH FORT MYERS UTILITY, INC., HOLDER OF CERTIFICATE NO. 247-S; AMENDMENT OF CERTIFICATE NO. 247-S; AND CANCELLATION OF CERTIFICATE NO. 309-S.
COUNTY: LEE

AGENDA: 01/16/01 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUES NOS. 3 AND 4 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: REVISED PAGES 2,4,5,7,14,15,16

FILE NAME AND LOCATION: S:\PSC\LEG\WP\000277.RCM

CASE BACKGROUND

MHC Systems, Inc. (MHC or utility) is a Class B utility which provides water and wastewater services in Lee County to 1,847 water and 1,839 wastewater customers. MHC's service area is a water-use caution area as designated by the South Florida Water Management District. The annual report for 1999 shows that the operating revenue was $408,638 and $460,317 and the net operating income was $70,384 and $81,391, for the water and wastewater systems respectively. The utility's facilities consist of four systems: one water treatment plant, one water transmission and distribution system, one wastewater collection system and one wastewater treatment plant. Rate base was established for this utility in

Docket No. 950193-WS, by Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, as $1,018,482 for water and $1,903,971 for wastewater.

On March 2, 2000, North Fort Myers Utility, Inc. (NFMU) filed an application for approval of the transfer of the facilities and Certificates Nos. 353-W and 309-S currently held by MHC Systems, Inc. d/b/a FFEC-Six to NFMU. On May 18, 2000, Mr. Alexander William Varga, a customer, filed an objection to the transfer application. On May 30, 2000, NFMU filed a Motion to Dismiss Mr. Varga's objection. By Order No. PSC-00-1649-PCO-WS, issued September 15, 2000, the Commission denied the utility's motion. Accordingly, this matter has been set for an administrative hearing.

On October 24, 2000, NFMU filed Motion for Summary Final Order and a Request for Oral Argument on the Motion. Correspondingly, the Office of Public Counsel (OPC) filed a timely amicus response on November 6, 2000, and Mr. Varga filed an untimely response on November 8, 2000. As a result of Mr. Varga's untimely response, NFMU filed a Motion to Strike on November 11, 2000, and Mr. Varga filed a timely response to NFMU's Motion to Strike on November 20, 2000.

By Order No. PSC-00-2349-PCO-WS, issued December 12, 2000, the Prehearing Officer granted petitions for intervention by Pine Lakes Homeowners Association II, Inc. (PLHOA) and Pine Lakes Estates Homeowners' Association (PLEHOA). Further, NFMU's request for official recognition was granted in part.

The purpose of this recommendation is to address NFMU's Motion for Summary Final Order and Motion to Strike. Staff is also addressing the issue of rates and charges and the Proposed Agency Action (PAA) issues of rate base and acquisition adjustment because, if protested, a Section 120.57(1), Florida Statutes, hearing would follow. Therefore, by addressing the PAA issues at this time, if any of the issues are protested, upon Commission approval, the protested issues could be incorporated into the Section 120.57, Florida Statutes, hearing scheduled for May 31, 2001 and June 1, 2001.

This recommendation was deferred to the January 16, 2001, agenda conference from the January 2, 2001, agenda conference, at the request of OPC. Staff is filing a new recommendation with respect to OPC's Amicus Response to NFMU's Motion for Summary Final Order. The recommendation is otherwise unchanged. The new language is identified by underscore.

The Commission has jurisdiction pursuant to Sections 367.011(2), 367.071, and 367.121, Florida Statutes.

ISSUE 1: Should the Commission grant NFMU's Request for Oral Argument?

RECOMMENDATION: Yes. Staff recommends that NFMU's request for oral argument should be granted. Oral argument should be limited to ten minutes for each party. (VAN LEUVEN)

STAFF ANALYSIS: On October 24, 2000, NFMU filed a Request for Oral Argument with its Motion for Summary Final Order, pursuant to Rule 25-22.038, Florida Administrative Code. In support of its request, NFMU states that oral argument will "aid the Commission in analyzing the arguments raised in the protest as they relate to the facts."

In this instance, staff believes that oral argument will aid the Commission in understanding and evaluating the complex issues in this matter. Further, due to the finality of the relief sought by NFMU, staff believes that it would be beneficial to allow oral argument on the Motion for Summary Final Order. Therefore, staff recommends that NFMU's Request for Oral Argument should be granted. Oral argument should be limited to ten minutes for each party and OPC.

It should be noted that if the Commission denies the Request for Oral Argument, parties and interested persons should be allowed to participate on Issues 3-5.

ISSUE 2: Should NFMU's Motion for Summary Final Order and Motion to Strike Mr. Varga's untimely response be granted?

RECOMMENDATION: NFMU's Motion for Summary Final Order should be denied and NFMU's Motion to Strike should be granted. Moreover, OPC's Amicus Response to NFMU's Motion for Summary Final Order should be considered as a request to participate as an amicus curiae, which request should be granted for the purpose of considering the matters contained therein as an amicus curiae submission rather than as a responsive pleading. (VAN LEUVEN)

STAFF ANALYSIS: On October 24, 2000, NFMU filed a Motion for Summary final Order. OPC filed an "amicus response" on November 6, 2000, and Mr. Varga filed an untimely response on November 8, 2000. As a result of Mr. Varga's untimely response, NFMU filed a Motion to Strike Mr. Varga's untimely response on November 11, 2000, and Mr. Varga filed a timely response to NFMU's Motion to Strike on November 20, 2000.

NFMU's Motion for Summary Final Order

Pursuant to Rule 28-106.204(4), Florida Administrative Code, NFMU moves for summary final order. In support of its Motion, NFMU states that "the pleadings, depositions, and admissions along with the attached affidavit show that there is no genuine issue of material fact and NFMU is entitled to a final order on the issues of financial and technical ability as a matter of law, even drawing every possible inference in favor of Mr. Varga's argument."

NFMU argues that Mr. Varga's objection is based upon the claim that NFMU does not have the financial or technical ability to operate the MHC system. NFMU alleges that Mr. Varga lacks any real evidence to support his positions and that he is "fast and loose with the truth." In support of this claim, NFMU cites to Mr. Varga's deposition in which he claims that the FBI had seized files from NFMU's attorney's offices which supported his position. However, when questioned further, Mr. Varga admitted that he was mistaken and that the FBI had not seized files from NFMU's attorney's offices.

As to Mr. Varga's challenge to NFMU's financial ability, Mr. Varga's states in his deposition that his claim that NFMU is on the verge of bankruptcy is based upon an analysis of NFMU's annual reports for 1997, 1998, and 1999 on file with the Commission. NFMU argues that even though Mr. Varga claims that NFMU is on the verge of bankruptcy and that its parent company must be keeping it afloat, Mr. Varga has provided no such evidence and he stated under

oath that he had no knowledge that NFMU was not meeting its financial obligations. Next, NFMU argues that the issue of its financial ability was addressed by the Commission in the final hearing in Docket No. 981781-SU on October 13, 1999. Following that hearing, by Order No. PSC-99-2444-AS-SU, the Commission concluded that NFMU had the financial ability to provide service to the nearby mobile home community of Buccaneer Estates. Further, NFMU argues that as recent as October 16, 2000, in Order No. PSC-00-1892-PAA-SU, the Commission made a similar finding that it has the financial ability to provide service. Also, NFMU attached an affidavit of Mr. A. A. Reeves, the Vice President and Utility Manager of NFMU, to its Motion which states that NFMU's financial status is unchanged since the Commission's most recent finding that it has the financial ability to provide service. Therefore, NFMU argues that it is entitled to summary disposition because the Commission has already found that NFMU has financial ability based upon the same annual reports which Mr. Varga relies upon in asserting that NFMU does not have the financial ability to serve the Pine Lakes and Fairways communities. In addition, NFMU asserts that Mr. Varga has failed to present any new evidence that has not been considered by the Commission.

As to technical ability, NFMU alleges that Mr. Varga's objection is based upon the Consent Order entered into with the Florida Department of Environmental Protection (DEP), OGC File No. 00-1116-36-DW. NFMU's argues that there is no genuine issue of material fact because Mr. Varga states in his deposition that all of the DEP violations can be attributed to MHC and none of them to NFMU. In addition, NFMU argues that in Order No. PSC-99-2444-AS-SU, after an evidentiary hearing, the Commission found that NFMU had the technical ability to provide wastewater service in North Fort Myers. Further, NFMU states that by Order No. PSC-00-1892-PAA-SU, issued October 16, 2000, the Commission found that NFMU had the technical ability to provide wastewater service.

As to rate base, NFMU states that it accepts the Commission's audit which established a water rate base of $754,108 and a wastewater rate base of $1,466,007.76. Further, pursuant to the affidavit of Mr. Reeves, NFMU has already booked the entries consistent with the Commission's audit.

NFMU also argues that it has not asked for an acquisition adjustment but reserves the right to raise the issue, if appropriate, in a future proceeding.

Lastly, NFMU states that it is charging the same rates and charges which were approved for MHC pursuant to Rule 25-9.044, Florida Administrative Code.

In summary, NFMU moves for summary final order because Mr. Varga has failed to present new evidence not considered by the Commission in its prior findings that NFMU has the financial ability to provide service. In addition, NFMU argues that Mr. Varga states in his deposition that all of the DEP violations can be attributed to MHC and none of them to NFMU. Therefore, NFMU believes that there is no genuine issues of material fact and that it is entitled to the entry of a summary final order.

OPC's Amicus Response to North Fort Myers Utility, Inc.'s Motion for Summary Final Order

On November 6, 2000, OPC filed an Amicus Response to NFMU's Motion for Summary Final Order. In its Amicus Response, OPC states that neither MHC nor NFMU objected to the filing. Subsequently, on December 29, 2000, OPC filed a letter confirming that it has received the written approval of all the parties to file its Amicus Response. Attached to the letter are copies of letters from NFMU, MHC, Mr. Varga, PLHOA, and PLEHOA, indicating, in writing, that they either consent or have no objection to OPC's filing of the Amicus Response.

OPC states that by Order No. PSC-00-1649-PAA-WS, issued September 15, 2000, the Commission granted Mr. Varga's objection and set this matter for a Section 120.57(1), Florida Statutes, hearing. Next, OPC states that in every transfer docket there are always at least two broad issues pursuant to Section 367.071, Florida Statutes. As argued by OPC, these broad issues are as follows:

1) Does the utility have the financial and technical ability to provide quality service to the customers, and is the transferee utility committed to provide that service?

2) Is the proposed transfer in the public interest?

In addition to these issues, OPC argues that every transfer docket also contains various sub-issues depending upon the unique facts of each case.

OPC concurs with NFMU that the holding of Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) case is the standard which must be met in order for NFMU's Motion for

Summary Final Order to be granted. According to OPC, the holding of Green is that a party moving for summary judgement is required to conclusively demonstrate the non-existence of any issue of material fact, and the Court must draw every possible inference in favor of the party against whom summary judgment is sought. OPC argues that it will be difficult for NFMU to meet this burden for the issues of financial and technical ability to serve. Further, OPC states that "it is impossible for NFMU to meet the burden of this extreme standard as it relates to the statutorily required broad issue of whether it is in the public interest to approve the proposed transfer."

Next, OPC makes several comments in support of Mr. Varga's arguments concerning the financial ability of NFMU and raises a new argument concerning Contributions in Aid-of-Construction (CIAC). Generally, OPC argues that the resolution of the financial ability issue involves many disputable issues of fact.

As to technical ability, OPC states that the Commission has never concluded that NFMU had the technical ability to provide water service and the resolution of this issue will most likely involve disputed material facts.

Finally, OPC argues that there are many disputable material facts which must be tested with cross-examination before the Commission can conclude that the proposed transfer is in the public interest. OPC argues that the parties have a statutory right to present evidence as to why this transfer is not in the public interest and why other alternatives are more in the public interest. Finally, OPC argues that the process of assessing competing disputed material facts cannot take place unless the customers are allowed the opportunity to present evidence as to why the public interest will be better served if the transfer is denied.

Mr. Varga's Untimely Response

On November 8, 2000, Mr. Varga filed an untimely response to NFMU's Motion for Summary Final Order. Mr. Varga's response addresses the preliminary issues raised by staff at the informal issue identification meeting on October 24, 2000, by stating that staff's preliminary issues are expressly designed to limit a plaintiff's ability to present meaningful arguments in opposition to a proposed transfer. Further, Mr. Varga states that he will introduce evidence "concerning three utilities and, in part, NFMU and their efforts to sell their assets to the Lee County Board of

Commissioners for a deliberately inflated and exorbitant price . . . ."

As to genuine issues of material fact, Mr. Varga raises issues concerning the financial and technical ability of NFMU to provide service. Mr. Varga's financial concerns pertain primarily to NFMU's cash flow and its parent company's ability to provide financial backing. As to Mr. Varga's technical concerns, he states that "while NFMU may be considered to have the technical 'ability' to maintain MHC Systems, Inc.'s wastewater plant, their recent intent and performance may not have been considered in the public interest."

NFMU's Motion to Strike Mr. Varga's Response to NFMU's Motion for Summary Final Order

On November 13, 2000, NFMU filed a motion to strike Mr. Varga's response to its motion for summary final order. In support of its Motion, NFMU states that pursuant to Rules 28-106.204(1) and 25-106.103, Florida Administrative Code, parties may file a response within 12 days after service of a motion. Therefore, a response, if any, should have been filed by November 6, 2000. Further, NFMU states that pursuant to Rule 28-106.104, Florida Administrative Code, filing means "received by the office of the agency clerk during normal business hours." Therefore, NFMU argues that since Mr. Varga's response was not filed until November 8, 2000, it should be stricken as untimely.

Mr. Varga e-mailed his response to staff counsel and the parties on Saturday, November 4, 2000. NFMU states that this is not the first time that Mr. Varga has ignored procedural rules. NFMU notes that Mr. Varga's initial objection was 42 days late and this Commission accepted the untimely objection under the doctrine of equitable tolling by concluding that Mr. Varga in good faith thought that his e-mail would serve as an objection. NFMU argues that "Mr. Varga cannot make that argument with regard to his most recent filing since it was made clear to him that the Commission had no rules to allow for filings by e-mail." Further, NFMU states that striking Mr. Varga's response is not unprecedented because in In re: Investigation of utility rates of Aloha Utilities, Inc., Order No. PSC-99-1233-PCO, and In re: Complaint of Mother's Kitchen against Florida Public Utilities Company, Order No. PSC-98-1254-FOF-GU, the Commission struck untimely responses.

Mr. Varga's Response to NFMU's Motion to Strike

Mr. Varga timely responded to NFMU's Motion to Strike on November 20, 2000, by stating that the U.S. Mail between Tallahassee and North Fort Myers is unpredictable. Mr. Varga argues that NFMU's motion is a pointless and transparent attempt to harass because all of the parties received his e-mail on November 4, 2000. However, Mr. Varga states that if his response is stricken, he will rely upon OPC's Amicus Response to NFMU's Motion.

In further support of his position that e-mail is an appropriate means of filing a response, Mr. Varga states the following:

> In effect, the Public Service Commission's Petition for Exception from the Uniform Rules of Procedure (Final Order No. APA 98-007) was a deliberate act, resulting in my inability to file my objections electronically, on a timely and reasonably expected date. In effect, the Commission's thoughtless act discriminated against me, and others, preventing our filing electronically and quite possibl[y] violating our constitutional rights to free speech.

Staff Analysis

Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The Motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits." A summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. See Section 120.57(1)(h), Florida Statutes (1999).

Under Florida law, it is well established that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary is sought. See Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985) and Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. St. DCA 1993)(citing to Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). "A summary judgment should not be granted unless the facts

are so crystallized that nothing remains but questions of law." Moore 475 So. 2d at 668 (citing Shaffran v. Holness, 93 So. 2d 94 (Fla. 1957)); McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996). "Summary judgment should be cautiously granted . . . . If the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact." McCraney, 677 So. 2d at 355 (citing Lashley v. Bowman, 561 So. 2d 406, 408 (Fla 5th DCA 1991)).

The burden is on the movant to demonstrate that the opposing party cannot prevail. Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996) (citing Snyder v. Cheezem Dev. Corp., 373 So. 2d 719 (Fla. 2nd DCA 1979)). If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. Id. The trial court must draw every possible inference in favor of the party against whom summary judgment is sought. Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996) (citing Moore, 475 So. 2d at 666). "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment." Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

It should be noted that in order for information to be considered by the court, it needs to have been properly introduced before the court. In Bifulco v. State Farm Mut. Auto. Inc. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997), the Court stated that

> Merely attaching documents which are not 'sworn to or certified' to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla.R.Civ.P. 1.510(e). Moreover, rule 1.510(e) by its very language excludes from consideration . . . any document that is not one of the enumerated documents or is not a certified attachment to a proper affidavit.

Therefore, a court may not properly consider information which has not been properly authenticated in deciding a motion for summary judgment. Daeda v. Blue Cross & Blue Shield of Florida, Inc., 698 So. 2d 617, 618 (Fla. 2nd DCA 1997). See also Booker v. Sarasota, Inc., 707 So. 2d 886, 889 (Fla. 1st DCA 1998)(stating that a court may not consider an unauthenticated document even where it appears that such document, if properly authenticated, may have been dispositive). To consider or rely on an unauthenticated document in ruling on a motion for summary judgment constitutes reversible error. Bifulco at 709.

Next, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists. Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985) (citing Landers v. Milton, 370 So. 2d 368 (Fla. 1979)).

In Order No. PSC-98-1538-PCO-WS, issued November 20, 1998, in Docket No. 970657-WS, the Commission stated that

> Pursuant to Section 120.54(5)(a)1., Florida Statutes, the uniform rules, not the Florida Rules of Civil Procedure (except for discovery), are the rules to be used by administrative agencies. Although the cited cases reference the rule for summary judgment under the Florida Rules of Civil Procedure, we believe the same principles and standards apply to a summary judgment proceeding initiated under the uniform rules since the language which specifies which documents may be considered in such proceeding mirrors the language used in the Florida Rules of Civil Procedure.

Further, the Commission has recognized that policy considerations need to be taken into account by stating that

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
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> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. Coastal Caribbean Corp. v. Rawlings, 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the

> Florida Rules of Civil Procedure governing summary judgment must be observed. Page v. Staley, 226 So. 2d 129, 132 (Fla. 4th DCA 1969). The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

Id.

NFMU states that there are no genuine issues of material fact because the Commission found in Order No. PSC-99-2444-AS-SU, issued December 14, 1999, that it had the financial and technical ability to operate the Buccaneer Estates system and in Order No. PSC-00-1892-PAA-SU, issued October 16, 2000, that it had the financial and technical ability to operate the Forest Park system. However, in his objection, Mr. Varga raises the issue of whether NFMU has the financial and the technical ability to operate the MHC system by stating that "NFMU reported losses of over $600,000 in their last annual report to the Florida Public Service Commission." He elaborated on this point in his deposition. Further, Mr. Varga stated in his objection that the transfer will place the communities in physical jeopardy.

After reviewing the pleadings, Mr. Varga's deposition, Mr. Reeves' affidavit, and the docket file, staff recommends that NFMU's Motion for Summary Final Order should be denied. Staff does not believe that NFMU has shown that the facts in this case are so crystallized that nothing remains but questions of law. After drawing every possible inference in favor of Mr. Varga, NFMU has failed to meet its burden of showing that no genuine issue as to any material fact exists. Although the Commission found in past transfer dockets that NFMU had the financial and technical ability to operate specific wastewater systems, the Commission has not determined whether NFMU has the financial and technical ability to operate this water and wastewater utility.

Further, staff believes that NFMU has failed to show that it is in the public interest for the Commission to grant a summary final order and preclude the objecting parties from their right to a Section 120.57(1), Florida Statutes, hearing. In this instance, staff believes that the pleadings and deposition indicate that disputable issues of material fact exist as to NFMU's financial and technical ability and whether the proposed transfer is in the public interest.

As to NFMU's arguments concerning rate base, acquisition adjustment, and the rates and charges, staff has addressed these arguments in Issues 3, 4, and 5, respectively.

With respect to OPC's Amicus Response, pursuant to Rule 28-106.204(4), Florida Administrative Code, only parties may file a response in opposition to a motion for summary final order. Moreover, OPC has not asked the Commission to participate as a amicus curiae or "friend of the court." Nevertheless, as noted above, in its Amicus Response, OPC states that neither MHC nor NFMU objected to the filing. Subsequently, on December 29, 2000, OPC filed a letter confirming that it has received the written approval of all the parties to file its Amicus Response. Attached to the letter are copies of letters from NFMU, MHC, Mr. Varga, PLHOA, and PLEHOA, indicating, in writing, that they either consent or have no objection to OPC's filing of the Amicus Response.

Staff notes that an amicus curiae generally participates in a proceeding by filing an amicus curiae brief for the purpose of "assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues." Ciba-Geigy, Ltd. v. Fish Peddler, Inc., 683 So. 2d 522, 523 (Fla. 4th DCA 1996). However, Chapter 120, Florida Statutes, Administrative Procedure Act, the Florida Rules of Civil Procedure, the Uniform Rules, and the Commission's rules do not provide for the filing of amicus briefs. Rule 9.370, Florida Rules of Appellate Procedure, addresses amicus curiae and states that:

> an amicus curiae may file and serve a brief in any proceeding with written consent of all parties or by order or request of the court. A motion to file a brief as amicus curiae shall state the reason for the request and the party or interest on whose behalf the brief is to be filed. Unless stipulated by the parties or otherwise ordered by the court, an amicus curiae brief shall be served within the time period prescribed for briefs of the party whose position is supported.

In Resort Timeshare Resales, Inc. v. Stuart, 764 F. Supp. 1495, 1500 (S.D. Fla. 1991), the court addressed the situation in the federal court system where the Federal Rules of Appellate Procedure and the Rules of the Supreme Court have provisions addressing the filing of amicus curiae briefs, but the Federal Rules of Civil Procedure lack such a provision at the trial court level. The court concluded that it had the inherent authority to appoint an amicus curiae, or "friend of the court," to assist in the proceeding. Further, the court stated that "Inasmuch as an

amicus curiae is not a party and does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus." Id. at 1501.

Staff believes that similarly, allowing participation as amicus curiae to file briefs or memorandums of law is within the discretion of the Commission. The Commission has allowed such filings in a few cases in the past. See, e.g., Order No. PSC-00-1265-PCO-WS, issued July 11, 2000, in Dockets Nos. 990696-WS and 992040-WS (The Commission denied a request to participate as amicus curiae for the purpose of filing a motion to dismiss, but considered the points raised in the pleadings as amicus curiae submissions); and Order No. PSC-99-0535-FOF-EM, issued March 22, 1999, in Docket No. 981042-EM (Louisville Gas & Electric Energy Corporation filed an Amicus Curiae Memorandum of Law in opposition to a motion to dismiss filed by a utility in the case).

Staff believes that the Commission has the discretion to treat and consider the points raised in OPC's response as an amicus submission, if it so desires. For the reasons discussed above, staff recommends that OPC's Amicus Response should be considered as a request to participate as an amicus curiae, which request should be granted for the purpose of considering the matters contained therein as an amicus curiae submission rather than as a responsive pleading.

Next, staff recommends that NFMU's Motion to Strike Mr. Varga's untimely response should be granted because the facts surrounding Mr. Varga's untimely filing fail to warrant the application of the doctrine of equitable tolling. As stated in NFMU's Motion, Mr. Varga's response was untimely by two days. Mr. Varga is aware of the Commission's current policy on e-mail filings considering that the Commission has previously addressed his failure to adhere to the Commission's filing rules. See Order No. PSC-1649-PCO-WS, issued September 15, 2000, in this docket (the Order which allowed Mr. Varga's objection)[1]. Therefore, staff recommends that Mr. Varga's response should be stricken because the doctrines of equitable tolling and excusable neglect do not apply under these circumstances.

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[1] As noted in Order No. PSC-00-1649-PCO-WS, the Commission has established an e-filings task force which is preparing an implementation plan and schedule for an electronic filing system.

REVISED

In summary, and for all the above reasons, staff recommends that NFMU's Motion for Summary Final Order should be denied, OPC's Amicus Response should be considered as an amicus curiae submission rather than as a responsive pleading, and NFMU's Motion to Strike Mr. Varga's untimely response should be granted. This matter should proceed to hearing, as scheduled.

ISSUE 3: If the Commission approves the application for transfer at a later date, what is the rate base of MHC at the time of transfer?

RECOMMENDATION: The rate base, which for transfer purposes reflects the net book value, is $754,109 for the water and $1,466,008 for wastewater system as of February 29, 2000. (JOHNSON)

STAFF ANALYSIS: Staff is addressing this PAA issue because, if protested, a Section 120.57(1), Florida Statutes, hearing would follow. By addressing this issue at this time, if it is protested, upon Commission approval, the issue could be incorporated into the Section 120.57, Florida Statutes, hearing.

According to the application, the net book value of the system was $1,056,929 for water and $1,606,752 for wastewater as of the December 31, 1989. Rate base was previously established by this Commission in Docket No. 950193-WS, which was an application for transfer. By Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, rate base was set at $1,018,482 for water and $1,903,971 for wastewater as of December 31, 1994.

Staff conducted an audit of the books and records of the utility to determine the rate base (net book value) as of February 29, 2000, which is the transfer date. The auditors reported that the books and records of MHC were in general compliance with Commission rules. According to the utility's books, as of February 29, 2000, the net book value was $784,145 for the water system and $1,467,097 for the wastewater system.

The Commission's audit report contained several exceptions. The exceptions included adjustments to Accumulated Depreciation, Accumulated Amortization CIAC, and equipment that was not transferred to the new owners of the utility. The utility did not file a response to the audit report. The following adjustments were made by staff as a result of the rate base audit.

UTILITY PLANT-IN-SERVICE

The utility's books showed plant-in-service account balances as $2,017,076 and $3,506,998, respectively for water and wastewater as of the transfer date. However, the utility did not transfer some automobiles, office equipment, and shop equipment to the new owners of the utility. Therefore, these items should be removed from rate base.

Staff removed the costs of these plant items from the plant-in-service balances. Accordingly, staff recommends that the plant-in-service balances should be decreased by $22,092 for water and $19,088 for wastewater. Further, staff recommends that the accumulated depreciation balances should be decreased by $22,092 for water and $13,998 for wastewater to remove the related accumulated depreciation for the plant that was not transferred.

Based on these adjustments, staff recommends that the plant-in-service balances are $1,994,984 and $3,487,910, for the respective water and wastewater systems as of February 29, 2000.

ACCUMULATED DEPRECIATION

The utility's books showed the accumulated depreciation account balances as $878,112 and $1,461,208, respectively, for water and wastewater as of February 29, 2000. The Commission's auditor calculated accumulated depreciation from January 1, 1995 to February 29, 2000, and reconciled adjustments from the last rate order to the books and found that the correct accumulated depreciation balances are $882,072 for water and $1,443,970 for wastewater.

There were several plant and accumulated depreciation adjustments required by Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, in Docket No. 950193, that the utility did not post. The plant adjustments did not change the total plant balances. However, the accumulated depreciation balances changed because the utility used the incorrect depreciation rate for office furniture, for six years, and did not post the adjustments required by PSC-95-1444-FOF-WS. In addition, the utility did not depreciate assets in 1999. The affect of these adjustments results in an increase of $26,052 for water and a decrease of $3,240 for the wastewater accumulated depreciation balances. In addition, as mentioned above, accumulated depreciation should be adjusted to remove the related depreciation for the automobiles, and plant equipment that was not transferred, for a net increase of $3,960 for water and a net decrease of $17,238 for wastewater.

ACCUMULATED AMORTIZATION OF CIAC

The utility recorded accumulated amortization of CIAC balances of $218,169 for water and $390,544 for wastewater, as of February 29, 2000. The utility applied the composite depreciation rate that was applied in transfer Docket No. 950193-WS, in Order No. PSC-95-1444-FOF-WS, issued November 28, 1995. The utility used this composite rate to amortize CIAC each year, instead of calculating

a composite rate each year to amortize CIAC. In addition to applying an incorrect amortization rate, the utility booked no amortization for the year 2000.

Staff calculated the appropriate composite rates for all years and for two months of the year 2000. To correct the accumulated amortization of CIAC balances, the water balance should be decreased by $3,984 and the wastewater balance should be increased by $761. Therefore, staff recommends that the appropriate accumulated CIAC amortization balances are $214,185 for water and $391,305 for wastewater.

RATE BASE

Staff's calculation of rate base is shown on Schedules Nos. 1 and 2, for the water and wastewater systems, respectively. Adjustments to rate base are itemized on Schedule No. 3. Based on the adjustments set forth herein, Staff recommends that rate base for MHC Systems, Inc. be established as $754,109 for the water system and $1,466,008 for the wastewater system as of February 29, 2000. This rate base calculation is used solely to establish the net book value of the property being transferred and does not include the normal rate making adjustments of working capital calculations and used and useful adjustments.

SCHEDULE NO. 1

MHC SYSTEMS, INC.

SCHEDULE OF WATER RATE BASE

As of February 29, 2000

DESCRIPTION	BALANCE PER UTILITY	STAFF ADJUSTMENTS		BALANCE PER STAFF
Utility Plant in Service	$2,017,076	($ 22,092)	(3)	$1,994,984
Land	$4,733	0		4,733
Accumulated Depreciation	($878,112)	($ 3,960)	(1,3)	($882,072)
CIAC	($577,721)	0		($577,721)
CIAC Amortization	$218,169	($ 3,984)	(2)	214,185
TOTAL	$784,145	($ 30,036)		$754,109

SCHEDULE NO. 2

MHC SYSTEMS, INC.

SCHEDULE OF WASTEWATER RATE BASE

As of February 29, 2000

DESCRIPTION	BALANCE PER UTILITY	STAFF ADJUSTMENTS		BALANCE PER STAFF
Utility Plant in Service	$3,506,998	($19,088)	(3)	$3,487,910
Land	$55,213	0		$55,213
Accumulated Depreciation	($1,461,208)	$17,238	(1,3)	($1,443,970)
CIAC	($1,024,450)	0		($1,024,450)
CIAC Amortization	$ 390,544	761	(2)	$391,305
TOTAL	$1,467,097	($ 1,089)		$1,466,008

SCHEDULE NO. 3

MHC SYSTEMS, INC.

SCHEDULE OF RATE BASE ADJUSTMENTS

As of February 29, 2000

AD #	EXPLANATION	ADJUSTMENTS WATER	ADJUSTMENTS WASTEWATER
	PLANT IN SERVICE		
3	Adjustment to Remove items not transferred	($22,092)	($19,088)
	ACCUMULATED DEPRECIATION		
1	Adjustments to reflect unrecorded Accum. Depr.	($26,052)	$3,240
3	Adjustment related to Plant items not transferred	$22,092	$13,998
	Total Adjustment	($3,960)	$17,238
	ACCUMULATED AMORT. CIAC		
2	Adjust. to reflect the correct composite rate	($3,984)	$ 761

ISSUE 4: If the Commission approves the application for transfer at a later date, Should an acquisition adjustment be included in the calculation of rate base?

RECOMMENDATION: No. No acquisition adjustment was requested. Moreover, there are no extraordinary circumstances in this case to warrant the inclusion of an acquisition adjustment. Therefore, staff recommends that no acquisition adjustment should be included in the calculation of rate base for purposes of transfer. (JOHNSON, VAN LEUVEN)

STAFF ANALYSIS: Staff is addressing this PAA issue because, if protested, a Section 120.57(1), Florida Statutes, hearing would follow. By addressing this issue at this time, if it is protested, upon Commission approval, the issue could be incorporated into the Section 120.57, Florida Statutes, hearing.

An acquisition adjustment results when the purchase price differs from the rate base for transfer purposes. The acquisition adjustment resulting from the transfer of MHC would be calculated as follows:

Purchase Price:	$4,200,000
Staff Calculated Rate Base:	2,220,117
Positive Acquisition Adjustment:	$ 1,979,883

The Buyer stated in its application that it was not seeking an acquisition adjustment. Therefore, staff recommends that a positive acquisition adjustment not be included in the calculation of rate base. Moreover, in the absence of extraordinary circumstances, it has been Commission practice that a subsequent purchase of a utility system at a premium or discount shall not affect the rate base calculation. Staff believes that there are no extraordinary circumstances regarding this purchase which justify an acquisition adjustment to rate base. Staff's recommendation is consistent with the Commission's previous decisions. See Order No. PSC-00-0913-PAA-WU, issued May 8, 2000, in Docket No. 970201-WU; Order No. PSC-00-0579-PAA-SU, issued March 22, 2000, in Docket No. 990975-SU; Order No. PSC-00-0682-FOF-WU, issued April 12, 2000, in Docket No. 990253-WU; Order No. PSC-00-0758-PAA-SU, issued April 17, 2000, in Docket No. 991056-SU; Order No. PSC-98-1231-FOF-WU, issued on September 21, 1998, in Docket No. 971670-WU; and Order

No. PSC-98-0514-FOF-SU, issued on April 15, 1998, in Docket No. 951008-SU.

ISSUE 5: Should the rates and charges approved for this utility be continued?

RECOMMENDATION: Yes, NFMU should continue charging the rates and charges approved for this utility system until authorized to change in a subsequent proceeding. (JOHNSON, VAN LEUVEN)

STAFF ANALYSIS: The utility's current rates for service were approved by the Commission in an administrative price index proceeding effective January 17, 2000. The utility's approved service availability charges were effective March 27, 1998, pursuant to Order No. PSC-95-1444-FOF-WS, issued November 28, 1995, in Docket No. 950193-WS.

Rule 25-9.044(1), Florida Administrative Code, provides that:

> In cases of change of ownership or control of a utility which places the operation under a different or new utility . . . the company which will thereafter operate the utility business must adopt and use the rates, classification and regulations of the former operating company (unless authorized to change by the Commission) . . . .

NFMU has not requested a change in the rates and charges of the utility and staff sees no reason to change them at this time. Accordingly, staff recommends that the utility continue operations under the existing tariff and apply the approved rates and charges until authorized to change by the Commission in a subsequent proceeding.

ISSUE 6: Should the docket be closed?

RECOMMENDATION: No, this docket should remain open to process the utility's transfer application. (VAN LEUVEN)

STAFF ANALYSIS: This docket should remain open to process the utility's transfer application.