

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for approval of a special ) DOCKET NO. 880596-SU  
 service availability contract between GULF )  
 AIRE PROPERTIES d/b/a GULF AIRE WASTEWATER ) ORDER NO. 20996  
 TREATMENT PLANT and C.M. PARKER and CECIL )  
 G. COSTIN, JR. IN GULF COUNTY ) ISSUED: 4-7-89  
 )

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD  
 BETTY EASLEY

ORDER DENYING MOTION TO TERMINATE

BY THE COMMISSION:

By Order No. 19435, issued as proposed agency action on June 6, 1988, this Commission approved a developer agreement between Gulf Aire Properties, Inc. d/b/a Gulf Aire Wastewater Treatment Plant (Gulf Aire) and C. M. Parker and Cecil G. Costin, Jr. (Developers), subject to certain modifications. We also rejected a proposed agreement between Gulf Aire and the Developers for the lease of a Developer-installed wastewater collection system, modified Gulf Aire's service availability policy and authorized Gulf Aire's collection of guaranteed revenues from the Developers.

Further, by Order No. 19435, we noted that a Developer Agreement Supplement provided that the "Developers shall be bound by the decision of the Florida Public Service Commission regarding approval of the Developers' Agreement, Lease Agreement, Easement Agreement, [and] any related documents or other matters relating to the provision of service by [Gulf Aire] to Developers." Finally, by Order No. 19435, we extended the period within which to protest that Order, in order to allow Gulf Aire adequate time to publish notice of the modifications to its service availability policy prior to the expiration of the protest period.

On July 5, 1988, the Developers filed a timely protest to Order No. 19435. Among the disputed issues of fact and law as stated by the Developers was "[w]hether [Developers] are precluded from protesting PAA Order No. 19435 as set forth herein by virtue of the above-described provision of the Supplement to the Developer Agreement."

On September 21, 1988, Gulf Aire filed a motion to "terminate" this proceeding and affirm Order No. 19435. The basis of Gulf Aire's motion is that, by the above-referenced language in the supplement to the developer agreement, the Developers waived their right to protest Order No. 19435. Gulf Aire, therefore, requests that we "terminate" this proceeding.

On September 28, 1988, the Developers filed a motion for a ten-day extension of time to file a response to Gulf Aire's motion to terminate. No objection was filed and the Developers' motion was, accordingly, granted. On October 10, 1988, the Developers filed a response to Gulf Aire's motion to terminate. The basic thrust of the Developers' response is that, by the above-referenced language in the supplement to the developer agreement, they agreed to abide by any "ultimate"

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decision by the Commission on these matters and that, since Order No. 19435 was issued as proposed agency action, it was not an "ultimate" decision by the Commission.

After Gulf Aire filed its motion and the Developers filed their response, the parties reached a tentative settlement of this proceeding and requested that the motion and response be held in abeyance, pending the finalization of their settlement. In addition, the prehearing and hearing dates were cancelled based upon the representations by the parties that a settlement was imminent. The parties were, however, unable to agree upon a written version of the settlement. Accordingly, this case has been rescheduled for a prehearing conference on August 4, 1989, and for a hearing on August 25, 1989. Since the case has been rescheduled for a hearing, Gulf Aire has requested that we rule on its motion to terminate this proceeding.

Gulf Aire's motion to terminate this proceeding is nothing more than a motion to dismiss. The standard that must guide us in ruling on this motion is, assuming that all allegations in the Developers' objection are true, and construing all inferences in favor of the Developers, Gulf Aire is, nevertheless, entitled to a dismissal as a matter of law.

Gulf Aire argues that the Developers have waived their right to object to Order No. 19435. However, as stated in their objection to that Order, Developers have included whether they have waived this right as one of their disputed issues of material fact. Further, in their response to Gulf Aire's motion to terminate, Developers argue that they agreed to abide by any "ultimate" decision by the Commission and that, since Order No. 19435 was issued as proposed agency action, it was not an ultimate decision. Gulf Aire argues that the Developers would be bound by any final decision of this Commission in any event and that, therefore, Developers' argument makes no sense.

In their response to Gulf Aire's motion to terminate, Developers further argue that they only signed the supplement to the developer agreement under duress. Therefore, Developers argue that, even if the Commission were to determine that they had waived their right to a hearing, it should reserve ruling on the matter in order to allow the parties to present evidence regarding the facts and circumstances surrounding the signing of and the intent of the parties regarding the supplement to the developer agreement.

Assuming, for the purpose of ruling on Gulf Aire's motion to terminate, that all allegations in Developers' petition are true and construing all inferences in favor of Developers, we do not believe that Gulf Aire has demonstrated that it is entitled to a dismissal as a matter of law. In fact, it appears to us that whether the Developers have, in fact, waived their right to a hearing is a disputed issue of material fact that would be more appropriately addressed during the hearing scheduled to be held in this case. Gulf Aire's motion to terminate is, accordingly, denied.

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Based upon the discussion above, it is

ORDERED by the Florida Public Service Commission that Gulf Aire Wastewater Treatment Plant's motion to terminate this proceeding is hereby denied.

By ORDER of the Florida Public Service Commission,  
this 7th day of APRIL, 1989.

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STEVE TRIBBLE, Director,  
Division of Records and Reporting

( S E A L )

RJP

by: Kay Flynn  
Chief, Bureau of Records

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 sewer 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.